80-758

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No. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE S.S. ZOE COLOCOTRONI, MARBONANZA COMPAÑIA NAVIERA, S.A., COLOCOTRONI LTD., COLOCOTRONI BROTHERS, S.A., THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG) and THE WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LONDON) LIMITED,

Petitioners,

-against-

THE COMMONWEALTH OF PUERTO RICO and THE ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented

1. Whether, consistently with the Due Process Clause of the Fifth Amendment to the Constitution and the Due Process Clause of Section 2 of the Organic Act of Puerto Rico, a Puerto Rico federal court may exercise *in personam* jurisdiction over a foreign marine protection and indemnity insurance company in an admiralty action, if the insurer's only contacts with the forum were its retainer of a Puerto Rico law firm and the fact that ships covered under its policies of indemnity insurance occasionally have been present in the territorial waters of Puerto Rico?

2. Whether the court of appeals' decision upholding personal jurisdiction over foreign insurance companies conflicts with the decision of this Court in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980)?

3. Whether, consistently with the Due Process Clause of the Fifth Amendment to the Constitution and the Due Process and Equal Protection Clauses of Section 2 of the Organic Act of Puerto Rico, a foreign insurance company may be held to a more stringent standard for determining whether it is amenable to the personal jurisdiction of the Puerto Rico federal court in an admiralty action, than other non-resident corporations?

4. Whether a foreign marine protection and indemnity insurance company may be sued directly in the Puerto Rico federal court by a party injured as a result of the acts of its insured where, by the terms of the policy of insurance, which was neither delivered nor issued for delivery in Puerto Rico, the insured's right to recover from the insurer does not arise until payment is first made by the insured in respect of any liability, costs or expenses and where no such payment has been made?

5. Whether damages for injuries to mangrove swamplands caused by oil pollution may be awarded under a

Puerto Rico statute providing for recovery of "the total value of the damages caused to the environment and/or natural resources" where there has been no diminution in fair market value of the real property impacted by oil and no loss of use, and where the swamplands will recover through the process of natural regeneration?

6. Whether the court of appeals' decision on measurement of damages to real property conflicts with the decisions of other courts of appeals?

The Parties

Defendants, petitioners herein, are the S.S. ZOE COLOCOTRONI, an oil tanker of Greek ownership and Panamanian registry, her owners, Marbonanza Compañia Naviera, S.A., their agents, Colocotroni Ltd. and Colocotroni Brothers, S.A., the ship's protection and indemnity insurer, The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg) (hereinafter "West of England-Luxembourg") and West of England-Luxembourg's managing agents, The West of England Ship Owners Mutual Insurance Association (London) Limited (hereinafter "West of England-London"). "West of England," as used herein in the singular, refers to both of the West of England defendants.

Plaintiffs, respondents herein, are the Commonwealth of Puerto Rico and the Environmental Quality Board ("EQB") of the Commonwealth of Puerto Rico.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
The Parties	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
A. Summary of the Pertinent Facts	2
1. The Oil Spill	2
2. The Insurance Companies	3
B. The Proceedings Below	5
1. The Proceedings in the District Court	5
2. The Decision of the Court of Appeals	5
a. Jurisdiction over West of England	7
b. Damages	9
Reasons for Granting the Writ	11
I. The Court of Appeals' Decision Upholding Personal Jurisdiction over the West of England Defendants is in Direct and Irreconcilable Conflict with the Mandate of this Court, and Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call For Exercise of this Court's Power of Supervision	11
A. The Decision of the Court of Appeals is in Direct Conflict with *World-Wide Volkswagen Corp.* v. *Woodson*	12
B. The Court Below Devised a Special "Minimum Contacts" Rule for Insurance Companies Which Would Deny Them Equal Protection of the Laws	15

PAGE

II. The Court of Appeals' Decision Upholding Direct Action against West of England Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for Exercise of this Court's Power of Supervision 16

III. The Court of Appeals' Decision Permitting the EQB to Recover Damages for Pollution of a Mangrove Swamp, in the Absence of Any Loss of Use or Diminution in Market Value, Is without Precedent and In Direct and Irreconcilable Conflict with Decisions of Other Federal Courts of Appeals 17

Conclusion 21

TABLE OF AUTHORITIES

Cases:

	PAGE
Associated Stations, Inc. v *Cedars Realty and Development Corp.*, 454 F.2d 184 (4th Cir. 1972)	19
Baillon v *Carl Bolander & Sons Co.*, 396 Minn. 155, 235 N.W.2d 613 (1975)	20
Ballester-Ripoll v. *Court of Tax Appeals of Puerto Rico*, 142 F.2d 11 (1st Cir. 1944), *cert. denied*, 323 U.S. 723 (1944).	2n
Banks v *Chicago Grain Trimmers Association*, 390 U.S. 459 (1968)	18
Big Rock Mountain Corp. v *Stearns Roger Corp.*, 388 F.2d 165 (8th Cir. 1968)	19
Bowes v *Saks & Co.*, 397 F.2d 113 (7th Cir. 1968)	19
Cook Industries v *Barge UM-308*, 622 F.2d 851 (5th Cir. 1980)	19
DeArmon v *St. Louis*, 525 S.W.2d 795 (Mo. App. 1975)	20
Dodge Street Building Corp. v *United States*, 341 F.2d 641 (Ct. Cl. 1965)	19
Douglas Aircraft Co. v *Kerns*, 164 F.2d 1007 (10th Cir. 1947)	20
Federal Trade Commission v *Simplicity Pattern Co.*, 360 U.S. 55 (1959)	17
Gila River Pima-Maricopa Indian Community v *United States*, 467 F.2d 1351 (Ct. Cl. 1972)	20
Hanson v *Denckla*, 357 U.S. 220 (1957)	15, 16
Heninger v *Dunn*, 101 Cal. App. 3d 858, 162 Cal. Rptr. 104 (1980)	20n
Hernandez v *Steamship Mutual Underwriting Association*, 388 F. Supp. 312 (D.P.R. 1974)	17
Koninklijke Luchtvaart Maatschaapij N.V. v *United Technologies Corp.*, 610 F.2d 1052 (2d Cir. 1969)	19
Leyerly v *United States*, 162 F.2d 79 (10th Cir. 1947)	18

PAGE

Maldonado v *Connecticut Light & Power Co.*, 31 Conn. Sup. 536, 328 A.2d 120 (1974) 20

McGee v *International Life Insurance Co.*, 355 U.S. 220 (1957) 15

Missouri Baptist Hospital v *United States*, 555 F.2d 290 (Ct. Cl. 1977) 20

The Nyland, 164 F. Supp. 741 (D.Md. 1958) 20

O'Brien Brothers Inc. v. *The Helen B. Moran*, 160 F.2d 502 (2d Cir. 1947) 19

Rector Wardens & Vestry of St. Christopher's Episcopal Church v. *C.S. McCrossan Inc.*, 306 Minn. 143, 235 N.W.2d 609 (1975) 20n

Reynolds Metals Co. v. *Lampert*, 316 F.2d 272 (9th Cir. 1963) 20

South Porto Rico Sugar Co. v. *Buscaglia*, 154 F.2d 96 (1st Cir. 1946) 2n

Standard Oil Co. v. *Southern Pacific R.R.*, 268 U.S. 146 (1925) 6

State Department of Environmental Protection v. *Jersey Central Power and Light Co.*, 125 N.J. Super. 97, 308 A.2d 671 (1973), *aff'd*, 133 N.J. Super. 375, 336 A.2d 750, *rev'd on other grounds*, 69 N.J. 102, 351 A.2d 337 (1975) 20

United States v. *Standard Oil Co.*, 332 U.S. 301 (1947) 17

Watson v. *Employers Liability Insurance Co.*, 348 U.S. 66 (1954) 16

W.H. Elliott & Sons v. *E. & F. King & Co.*, 291 F.2d 79 (1st Cir. 1961) 20

Wm. Roe & Co. v. *Armour & Co.*, 414 F.2d 862 (5th Cir. 1969) 20

World Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980) ..... *passim*

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1333(1) 5

	PAGE
Federal Water Pollution Control Act, Section 311(f), 33 U.S.C. § 1321(f)(1979)	18
Outer Continental Shelf Lands Act, 43 U.S.C. § 1813(a)(1980)	18
Organic Act of Puerto Rico, Section 2, 48 U.S.C. § 737(1952)	2
Public Policy Environmental Act of the Commonwealth of Puerto Rico, Section 11(29), 12 L.P.R.A. § 1131(29)(1978)	*passim*
Insurance Code of the Commonwealth of Puerto Rico, Section 11.190, 26 L.P.R.A. § 1119(1978)	2
Insurance Code of the Commonwealth of Puerto Rico, Section 20.030, 26 L.P.R.A. § 2003(1977) (Puerto Rico Direct Action Statute)	1, 5
Rules of Civil Procedure of the Commonwealth of Puerto Rico, Rule 4.7(a)(1), 32 L.P.R.A., App. II, R.4.7(a)(1) (1977) (Puerto Rico Long-Arm Statute)	*passim*
Constitutional Provisions:	
Fifth Amendment to the United States Constitution	2
Fourteenth Amendment to the United States Constitution	2
Other Authorities:	
11 COUCH ON INSURANCE 2D § 44.4 (2D ED. 1963)	12n
RESTATEMENT (SECOND) OF TORTS § 911(1979)	5
RESTATEMENT (SECOND) OF TORTS § 929(1979)	18, 19, 20n

Opinions Below

The prior opinions most pertinent to this Petition are the August 12, 1980 Opinion of the United States Court of Appeals, 628 F.2d 652 (1st Cir. 1980), reproduced in the Appendix at 1a[1], the August 16, 1978 Opinion of the district court, 456 F. Supp. 1327 (D.P.R. 1978) (57a), and the unreported Opinion and Order of the district court filed January 14, 1977 (109a).

Other opinions of the courts below reproduced in the Appendix are the July 10, 1979 Opinion of the court of appeals, 601 F.2d 39 (1st Cir. 1979) (49a); the June 11, 1979 Memorandum and Order of the court of appeals (55a); the Opinions and Orders of the district court of October 21, 1977 (103a), November 7, 1975 (119a), September 17, 1975 (121a), April 11, 1974 (122a), April 8, 1974 (124a), January 31, 1974 (137a), July 3, 1973 (15[illegible]) and June 19, 1973 (155a), and the United States Magistrate's Report and Recommendation of March 21, 1974 (126a).[2]

Jurisdiction

The Judgment of the court of appeals, entered on August 12, 1980, is reproduced in the Appendix to this Petition. (159a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

This petition involves the following statutory provisions, set forth in full in the Appendix hereto: Section 20.030 of the Puerto Rico Insurance Code (Puerto Rico Direct Action Statute), 26 L.P.R.A. § 2003(1) (1977) (162a); Section

1. Page references to the Appendix to this Petition, which is bound separately, are cited "__a."

2. The Magistrate's Report and Recommendation of March 25, 1974 is included in the Appendix because it was adopted by the district court in its order of September 17, 1975.

11.190 of the Puerto Rico Insurance Code, 26 L.P.R.A. § 1119 (1978) (163a); Rule 4.7(a)(1) of the Puerto Rico Rules of Civil Procedure (Puerto Rico Long-Arm Statute), 32 L.P.R.A., App. II, R.4.7(a)(1) (1977) (161a); and Section 11(29) of the Public Policy Environmental Act of the Commonwealth of Puerto Rico, 12 L.P.R.A. § 1131(29) (1978) (160a). It also involves the Due Process Clause of the Fifth Amendment to the Constitution, which provides "No person shall . . . be deprived of life, liberty or property, without due process of law," and the Due Process and Equal Protection Clauses of Section 2 of the Organic Act of Puerto Rico,[3] 48 U.S.C. § 737 (1952), which provide:

> "No law shall be enacted in Puerto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws."

Statement of the Case

A. Summary of the Pertinent Facts

1. *The Oil Spill*

On March 18, 1973, while on a voyage for her time charterer, the S.S. ZOE COLOCOTRONI spilled about 5000 tons of medium crude oil near the southwest coast of Puerto Rico. (1a-2a). Oil from the ZOE COLOCOTRONI came ashore in Bahía Sucia ("Dirty Bay"),[4] at the southwest corner of Puerto Rico, polluting the shoreline and several

3. The same guarantees of due process and equal protection afforded by the Fourteenth Amendment to the Constitution have been extended to Puerto Rico by Section 2 of the Organic Act. South Porto Rico Sugar Co. v. Buscaglia, 154 F.2d 96, 99-100 (1st Cir. 1946); Ballester-Ripoll v. Court of Tax Appeals of Puerto Rico, 142 F.2d 11, 18-19 (1st Cir. 1944), *cert. denied*, 323 U.S. 723(1944).

4. The court of appeals wrote:

> "The district court noted that the configuration of Bahía Sucia, together with the prevailing winds and currents, made the bay a natural trap for floating debris, including small quantities of petroleum and tar." (6a-7a, footnote omitted.)

groves of mangrove trees. It is undisputed that mangrove trees and marine organisms were killed by the oil spill, although there is disagreement as to the extent of damage. (7a-14a). The Commonwealth of Puerto Rico is the owner of the entire area polluted by oil. (31a,n.20).

2. *The Insurance Companies*

Both West of England-Luxembourg and West of England-London are foreign corporations without any formal ties to Puerto Rico. Neither has ever maintained an office or agent in Puerto Rico, nor has it sold insurance, performed services or solicited business there. (24a). Moreover, as the court of appeals conceded, "the record . . . does not indicate any explicit undertaking by West of England to insure vessels in Puerto Rican waters." (28a).

The ZOE COLOCOTRONI was insured by West of England-Luxembourg under a marine protection and indemnity ("P&I") insurance policy. The terms and conditions of this policy are set forth in the 1972 edition of the Rules of West of England-Luxembourg. (SA166, SA190.)[5] The insurance contract does not, by its terms, specifically cover risks arising in Puerto Rico, nor does this worldwide policy specifically exclude such risks from coverage.

Among the terms and conditions of the P&I policy covering the ZOE COLOCOTRONI is a "no action" clause, barring recovery by a shipowner from West of England-Luxembourg before a payment has been made:

> "18. Unless the Association in its absolute discretion shall otherwise determine, it shall be a condition precedent of an insured Owner's right to recover from the funds of the Association in respect of any liability, costs or expenses that he shall first have discharged or paid the same." (SA198)

5. Page references to the 10 volume Appendix used before the court of appeals are cited "A___," and the 3 volume Consolidated Supplemental Appendix as "SA___."

Vessels insured by West of England have visited and operated within the territorial waters of Puerto Rico, and matters which could give rise to claims by owners for indemnification under their P&I policies, such as the ZOE COLOCOTRONI oil spill, have occurred in Puerto Rico. (27a) There is no evidence that West of England had knowledge that the ZOE COLOCOTRONI would visit Puerto Rico. To the contrary, the ship was on a time charter, and its itinerary was not revealed to West of England.

Pursuant to West of England-Luxembourg's Rules, it may employ lawyers, surveyors and other persons on behalf of insured owners in connection with matters which could give rise to claims by the owners for indemnification. (SA208, SA257). The West of England defendants have retained "correspondents" in maritime jurisdictions around the world[6] to attend to such matters. The San Juan, Puerto Rico law firm of Hartzell, Ydrach, Mellado, Santiago, Perez & Novas was named on West of England's lists of correspondents, and from time to time provided services to insured shipowners at the request of West of England. (SA74, SA183). It also has represented West of England in direct actions, including the instant case.

There is no evidence of any other "contacts" between West of England and Puerto Rico.

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6. West of England's lists of correspondents contained the following notice:

> "Whilst the Association does not appoint agents, the following are the names of experts and lawyers usually engaged to advise on claims in which the Association is concerned. Captains and agents should consult them in cases of emergency and difficulty connected with matters covered by the Rules of the Association, when there is not time to apply to their owners for instructions. . . . Asterisk denotes lawyers." (SA63, SA172).

B. The Proceedings Below

1. *The Proceedings in the District Court*

Plaintiffs brought suit on March 19, 1973 for the costs of oil removal and clean-up and for environmental damages. Jurisdiction in the district court was based upon 28 U.S.C. § 1333(1) (admiralty). (58a)

West of England moved to quash service of process, purportedly made pursuant to the Puerto Rico Direct Action and Long-Arm Statutes, and to dismiss the action against it. This motion was denied by the district court in its Opinion and Order of January 14, 1977 (109a), in which the court wrote: "[I]t seems apparent that an insurance policy issued in favor of a vessel follows the vessel whereever it sails. . . ." (116a)

In December 1977, the case was tried on the question of damages only, the issue of liability having been resolved against the defendants as a sanction for their failure to appear for depositions. (103a). A survey of the area affected by oil had been conducted in October, 1977 by plaintiffs' expert engineer, Rafael Cruz Perez, and was accepted into evidence. (A1389). It showed that petroleum residues had been found in about 15 acres of land on the west side of Bahia Sucia, of which about 3.5 acres contained mangroves ("West Mangrove").[7] (8a, see map at 102a). Defendants' expert marine biologist, Dr. Edward S. Gilfillan, testified that he expected the area to be restored by natural processes within ten to fifteen years, if not less (12a), but plaintiffs' experts were not in agreement.

The only evidence of the market value of the lands polluted by oil was an appraisal report by defendants' real estate expert on contemporaneous sales of like property. (A1809). *See* RESTATEMENT (SECOND) OF TORTS, § 911,

7. The Cruz Perez survey also purported to find oil on land on the east side of Bahia Sucia, but the district court held that plaintiffs had failed to prove that the east side had been damaged. (8a,85a).

Comment f (1979); *Standard Oil Co.* v. *Southern Pacific R.R.*, 268 U.S. 146, 155 (1925). It showed that land near the site of the oil spill and similar to the affected property had been sold for between $3,000 and $5,670 per acre during the period from 1971 through 1977. (A1820-A1821, 35a-36a). There was no evidence in the record that the fair market value of the lands impacted by oil had diminished as a result of the oil spill.

In its decision of August 16, 1978, the district court ruled that the Commonwealth of Puerto Rico had standing to sue by reason of its proprietary interest in the affected property and pursuant to the common law doctrines of "trustee of the public trust" and *parens patriae*. (69a). The Court also held that the EQB had a cause of action arising under Section 11(29) of the Puerto Rico Public Policy Environmental Act.[8] (70a).

The district court awarded plaintiffs their oil removal expenses of $78,108.89, and, although it recognized that the area would recover naturally in time, environmental damages in the amount of $6,086,083.20, including $5,526,583.20 for the purported loss of 92,109,720 marine organisms and $559,500 for replanting, fertilizing and monitoring mangrove trees. (85a-86a). It denied plaintiffs' request for over $7,000,000 in damages for removal of oiled sediments and mangroves, on the ground that such an operation "would bring about the total destruction of this environment without any real guarantee of ultimate success." (86a).

2. *The Decision of the Court of Appeals*

The court of appeals vacated the district court's award of environmental damages, but ruled against defendants on the questions presented in this Petition—jurisdiction over

8. Section 11(29) of the Puerto Rico Public Policy Environmental Act authorizes suits by the EQB "to recover the total value of the damages caused to the environment and/or natural resources." (160a).

West of England and measurement of damages—and remanded the case to the district court for reevaluation of environmental damages. (1a-48a).

a. Jurisdiction Over West of England

The court of appeals held that West of England had "carrie[d] out business transactions within Puerto Rico" for purposes of the Commonwealth's long-arm statute (161a), and accordingly was within the personal jurisdiction of the Puerto Rico federal court. It concurred with the district court that "West of England's business contacts with Puerto Rico—in particular, its regular writing of insurance covering vessels like the ZOE COLOCOTRONI, which visited Puerto Rico and operated within Puerto Rican waters—satisfied both the statutory and constitutional tests." (26a). West of England's writing of protection and indemnity insurance policies, which were worldwide in geographic coverage, was held to be sufficient to confer personal jurisdiction over it on the ground that these "contracts of insurance contained no provision preventing any ship from calling on Puerto Rico, or limiting coverage in the event it did." (27a). Under the decision below, West of England would expressly have to exclude Puerto Rico from the coverage of its policies of marine insurance, which contain no territorial limitations, to avoid being subjected to the personal jurisdiction of the Puerto Rico courts. (29a).

In addition, the court below cited West of England's relationship with the Hartzell law firm in support of its decision on jurisdiction. However, the court's findings with respect to the Hartzell firm are seemingly inconsistent. First, it affirmed the trial court's finding that any purported "non-legal" activities of the Hartzell law firm as a "correspondent" of West of England "were so 'substantially intertwined with Hartzell's primary professional

functions' as defendants' retained law firm that it could not hold Hartzell to be a 'managing or general agent' for purposes of accepting service of process on Hartzell's client." (25a, *quoting* 115a).

But the court also concluded that Hartzell's activities could be considered as "contacts" of West of England with Puerto Rico for jurisdictional purposes. Specifically, it ruled that West of England had "advertised" to owners the availability of claims services in Puerto Rico by listing Hartzell as a "correspondent," and that the cases handled by Hartzell should have put West of England on notice that ships it insured were visiting Puerto Rico:

> "While West of England was not engaged in selling insurance in Puerto Rico, its retention of the Hartzell law firm to perform services for insured owners and vessels in Puerto Rico demonstrates that West of England plainly expected its worldwide business of insuring maritime risks to embrace the territorial waters of Puerto Rico with some regularity." (27a).

The court of appeals added the following gratuitous comment:

> "The result we reach is further buttressed by the Supreme Court's occasional suggestions that the test for measuring minimum contacts for insurance companies may be somewhat less stringent than for other nonresident corporations because of the forum state's public policy interest in promoting effective redress for injuries. *See McGee* v. *International Life Insurance Co.,* 355 U.S. 220, 223 (1957); *cf. Hanson* v. *Denckla,* 357 U.S. 235, 252 (1958)." (30a,n.18).

The court of appeals did not explain why the provision of the West of England-Luxembourg's terms and conditions of insurance that indemnification would be made only after payment by the insured, which would have barred a contemporaneous action against West of England by the ZOE

COLOCOTRONI's owners, would not also have barred an action against West of England by third parties.

b. DAMAGES

The court of appeals found that the EQB had a cause of action under Section 11(29) of the Puerto Rico Public Policy Environmental Act for recovery of the "total value of the damages caused to the environment and/or natural resources;" the court did not reach the other questions of standing to sue. (30a-35a, 160a). The legislative history of the environmental statute offers no explanation of the origin of the quoted language or its intended meaning. Nor, to the best of our knowledge, have any courts, apart from the court below, had occasion to apply or interpret Section 11(29).

Since there was no showing of any diminution in market value or loss of use of the affected property, or of any loss of commercially valuable plant or animal life, defendants argued, under the well-established principles of common law, that no damages, other than clean-up expenses, should have been awarded to plaintiffs. See pp. 18-20 *infra*. However, in spite of the absence of any legislative or judicial guidelines for interpretation of the language of Section 11(29), the court below held that this statute "envisions the awarding of damages on a different basis than would have been traditionally allowed." (36a).

The court rejected defendants' contention that commercial or market value should serve as the standard for measuring "the total value of damages" under the environmental statute, and instead held the "primary standard for determining damages" to be "the cost reasonably to be incurred by the sovereign or its designated agency to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as is feasible

without grossly disproportionate expenditures."[9] (40a-41a). Since, as the court observed, "the EQB concedes the land [polluted by oil] has no significant commercial or market value" (36a), the district court has been authorized by this decision to award substantial damages on remand where none would be allowed under the traditional rules.[10]

The court of appeals failed to cite any authorities supporting its decision to abandon the traditional rules. Indeed, its decision is grounded primarily on the court's own speculation as to the meaning of the statutory language:

> "The Puerto Rico statute authorizing this action specifically empowers the EQB to recover 'the *total value* of the damages caused to the environment and/or natural resources' upon a violation of the anti-pollution provisions. 12 L.P.R.A. § 1131 (29) (emphasis added). Implicit in this choice of language, we think, is a determination not to restrict the state to ordinary market damages. Many unspoiled natural areas of considerable ecological value have little or no commercial or market value. Indeed, to the extent such areas have a commercial value, it is logical to assume they will not long remain unspoiled, absent some governmental or philanthropic protection. A strict application of the diminution in value rule would deny the state any right to recover meaningful damages for harm

9. On remand, the district court also has been instructed to take into consideration, *inter alia*, the possibility of complete natural regeneration, the cost of restoring the property affected by oil, the cost of restoring other areas where the presence of oil would not pose a hazard to ultimate success, and the cost of acquiring comparable lands for public parks. (41a-42a, 46a-47a).

10. Under the common law "diminution rule," the measure of damages for injury to real property is the difference in value immediately before and immediately after the event causing the injury, unless the land can be restored to its former condition at a cost less than the diminution in value, in which case, the cost of restoration is the proper measure. Damages may also be awarded for loss of use. See pp. 18-19 *infra*.

to such areas, and would frustrate appropriate measures to restore or rehabilitate the environment." (36a-37a).

* * *

"In enacting section 1131, Puerto Rico obviously meant to sanction the difficult, but perhaps not impossible, task of putting a price tag on resources whose value cannot always be measured by the rules of the marketplace." (38a).

Finally, the court observed:

"To say that the law on this question is unsettled is vastly to understate the situation. The parties in this lawsuit, and we ourselves, have ventured far into uncharted waters. We do not think plaintiffs could reasonably have been expected to anticipate where this journey would take us." (46a).

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals' Decision Upholding Personal Jurisdiction over the West of England Defendants Is in Direct and Irreconcilable Conflict with the Mandate of this Court, and Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for Exercise of this Court's Power of Supervision.

The court of appeals' decision that the district court's exercise of personal jurisdiction over West of England did not offend the limitations imposed by the Due Process Clause of Section 2 of the Organic Act of Puerto Rico is in direct and irreconcilable conflict with the standards set forth by this Court. The decision below greatly expands the scope of long-arm jurisdiction and introduces a wholly novel dimension, in direct contravention of the ruling in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980).

At the outset, the court of appeals correctly stated the "essential constitutional question" -- "whether West of England 'purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' "[11] However, in an unprecedented departure from this well-founded test, the court predicated long-arm jurisdiction on West of England's protection and indemnity insurance contract with the ZOE COLOCOTRONI's owners, which insured against risks encountered wherever the vessel might travel. No purposeful action was cited as a ground upon which the district court exercised personal jurisdiction; the basis was West of England's failure specifically to exclude Puerto Rico from the coverage of its insurance policy.[12]

In short, the decision below for the first time places on a nonresident insurer the burden to act to prevent contact between its insureds and a remote forum, in order to avoid being subjected to jurisdiction *in personam* there.

A. The Decision of the Court of Appeals is in Direct Conflict with *World-Wide Volkswagen Corp.* v. *Woodson*

The decision of the court of appeals upholding jurisdiction over West of England is in direct conflict with the landmark case of *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). In *World-Wide Volkswagen*, an Audi dealer and regional distributor resident in New York were held not to be amenable to suit in Oklahoma state court for

11. 26a, *quoting* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

12. The court of appeals overlooked the fact that under West of England's protection and indemnity insurance contract, West of England is only required to indemnity the insured shipowner after payment has been made. (SA198). Where, geographically, a loss may have been sustained is not relevant to West of England, for unlike an automobile liability insurer, West of England does not stand in the shoes of the insured to defend claims wherever brought. (Under a liability policy, the insurer is required to shield the insured from liability. *See* 11 Couch on Insurance 2d § 44.4 (1963))

injuries arising from an accident in Oklahoma involving an allegedly defective automobile sold in New York. The dealer and distributor concededly could foresee that automobiles sold in New York would be driven from New York to the other contiguous states. Travel was facilitated by "an extensive chain of Volkswagen service centers throughout the country, including some in Oklahoma." 444 U.S. at 298-99 (footnote omitted.)

In reversing the judgment of the Oklahoma Supreme Court, this Court held:

> "[F]inancial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State. . . . In our view, whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State's exercise of *in personam* jurisdiction over them." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 299 (citation omitted.)

The instant case, involving as it does a vessel, the "very purpose" of which "is to travel," *World-Wide Volkswagen*, 444 U.S. at 298, is factually analogous to *World-Wide Volkswagen*. Just as the petitioners in *World-Wide Volkswagen* had no idea where the vehicles they sold would be driven, West of England lacked knowledge of the routes to be traveled by the ZOE COLOCOTRONI, which was on a time charter and not in scheduled service. West of England, by insuring the ZOE COLOCOTRONI, no more purposefully availed itself of the benefits of doing business in remote jurisdictions than did the *World-Wide Volkswagen* petitioners. This Court has specifically rejected the notion that "[a]menability to suit . . . travel[s] with the chattel." *World-Wide Volkswagen,* 444 U.S. at 296.

The court of appeals purported to distinguish *World-Wide Volkswagen* on grounds that (1) ships insured by West of England visited Puerto Rico on numerous occasions, whereas only one automobile sold by the *World-Wide Volkswagen* petitioners was known to have entered Oklahoma; and (2) there was nothing the *World-Wide Volkswagen* petitioners could have done to prevent contact between the vehicle and Oklahoma, whereas West of England could have excluded Puerto Rico from the coverage of its insurance contracts. (29a). Neither point is well taken. Just as the *World-Wide Volkswagen* petitioners could foresee that any automobile they sold could be driven to Oklahoma, West of England could foresee that any of its insured's ships might on some occasion call on Puerto Rico. However, as this Court made clear, "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297.

Moreover, we submit that the affirmative obligation placed upon West of England to exclude particular jurisdictions from the coverage of its contracts of insurance to avoid being subjected to personal jurisdiction in remote forums of the globe is analogous to subjecting the *World-Wide Volkswagen* petitioners to personal jurisdiction in Oklahoma because their automobile sale contracts did not prohibit use of the vehicle in Oklahoma.[13]

13. As a practical matter, exclusion of Puerto Rico from the coverage of marine insurance policies might not be in the best interests of the people of Puerto Rico. If such a policy exclusion were included in West of England's P & I insurance contracts, it would be impossible to enforce prospectively. Indeed, if a shipowner defied his policy exclusion by sending an oil tanker to Puerto Rico, third parties might well be without a remedy against the P & I insurer, even in the courts of England, for damages resulting from oil spilled by the ship, due to the owner's wilful violation of the terms of his policy.

In sum, the court of appeals has expanded the scope of long-arm jurisdiction in direct contravention of this Court's recent decision to the contrary. Unless reviewed by this Court, the court of appeals' decision could thwart the nationwide application of the standards set forth in *World-Wide Volkswagen* v. *Woodson,* and lead to much unnecessary litigation. Moreover, the decision below places unreasonable burdens on interstate and foreign commerce, by forcing indemnity insurers to police the travels of their insureds. Finally, by relying on the retention of a lawyer as evidence of jurisdictional presence, the court of appeals' ruling undermines the attorney-client relationship, without justification.

B. The Court Below Devised a Special "Minimum Contacts" Rule for Insurance Companies Which Would Deny Them Equal Proctection of the Laws

Furthermore, the court of appeals gratuitously found in *McGee* v. *International Life Insurance Co.*[14] and *Hanson* v. *Denckla*[15] "suggestions that the test for measuring minimum contacts for insurance companies may be somewhat less stringent than for other nonresident corporations because of the forum state's public policy interest in promoting effective redress for injuries." (30a, n.18) We submit that there are no such "suggestions" in these or any other decisions of this Court.

As explained in *Hanson* v. *Denckla,* the defendant insurance company in *McGee* actively transacted business in California, where suit was brought, soliciting business and accepting premiums in that state through the mails:

> "In *McGee,* the nonresident defendant solicited a reinsurance agreement with a resident of California. The offer was accepted in that State, and the insurance premiums were mailed from there until

14. 355 U.S. 220 (1957).
15. 357 U.S. 235 (1958).

> the insured's death. Noting the interest California has in providing effective redress for its residents when nonresident insurers refuse to pay claims on insurance they have solicited in that State, the Court upheld jurisdiction because the suit 'was based on a contract which had substantial connection with that State.'" *Hanson* v. *Denckla,* 357 U.S. at 251-52.

Clearly, a nonresident corporation transacting business under such circumstances would be subject to the personal jurisdiction of the State of California, whether it was marketing insurance or digital wristwatches.

We respectfully submit that a nonresident insurance company is entitled to be judged by the same jurisdictional standards as any other nonresident. The discriminatory standards enunciated by the court below are inconsistent with the rights of due process of law and equal protection of the laws guaranteed by Section 2 of the Organic Act of Puerto Rico.

II.

The Court of Appeals' Decision Upholding Direct Action against West of England Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call For Exercise of this Court's Power of Supervision

As noted above, the policy of insurance covering the ZOE COLOCOTRONI contained a "no action" clause preventing suit or recovery by the owners against West of England-Luxembourg before actual payment of a judgment or settlement. (SA198). It generally has been held that such a clause bars a direct action against the insurer, unless the clause is void under State law. *See Watson* v. *Employers Liability Assurance Corp.*, 348 U.S. 66 (1954).

Section 11.190 of the Puerto Rico Insurance Code permits the invalidation of such a "no action" clause, but it is applicable only to a "policy delivered or issued for delivery in

Puerto Rico." (163a). Since the policy herein was neither delivered nor issued for delivery in Puerto Rico, Section 11.190 does not apply, and a direct action under the Puerto Rico Direct Action Statute is "subject to the conditions of the policy," including the "no action" clause. (162a). *Cf. Hernandez* v. *Steamship Mutual Underwriting Association,* 388 F. Supp. 312 (D.P.R. 1974).

However, the court of appeals has completely ignored the "no action" clause in holding West of England to be amenable to suit in Puerto Rico. It has effectively rewritten the policy of indemnity insurance without statutory authority.

Since the court of appeals has assumed the powers of the legislature in a radical and far-reaching departure from the usual course of judicial proceedings, this Court should grant the writ of certiorari in the exercise of its power of supervision, and reverse the decision below. *Cf. Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959); *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947).

III.

The Court of Appeals' Decision Permitting the EQB to Recover Damages for Pollution of a Mangrove Swamp, in the Absence of Any Loss of Use or Diminution in Market Value, Is without Precedent and in Direct and Irreconcilable Conflict With Decisions of Other Federal Courts of Appeals.

The court of appeals' decision permitting the EQB to recover damages for injuries to real property where there has been no diminution in fair market value or loss of use is without judicial or legislative authority and in direct and irreconcilable conflict with decisions of other federal courts of appeals.

As noted previously, the EQB's cause of action arose under a Commonwealth statute providing for recovery of the "total value of the damages caused to the environment and/or natural resources." (160a). The court of appeals asserted that its novel and expansive interpretation of the

phrase "total value" was consistent with two federal statutes which became effective after the trial herein, the Clean Water Act Amendments of 1977 to Section 311 of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1321(f) (1979) (effective December 27, 1977), and the Outer Continental Shelf ("OCS") Lands Act Amendments of 1978, 43 U.S.C. § 1813(a) (1980).

However, the OCS Lands Act permits the assertion only of "[c]laims for economic loss", which the instant case does not involve. 43 U.S.C. § 1813(a). Section 311(f)(1) of the FWPCA sets a relatively low upper limit of $250,000 or $150 per gross ton, whichever is greater, on the total amount that can be recovered from a vessel carrying oil, for oil removal and restoration or replacement of natural resources. 33 U.S.C. § 1321 f(1),(4). Consequently, a claim under Section 311(f) would be restricted by the statutory limits, and not the vague admonitions of the court below, even if the statute were applicable.[16]

It is submitted that, in the absence of any legislative history of Section 11(29) of the Puerto Rico environmental act, the ordinary meaning of the words "total value of the damages caused to the environment and/or national resources" should be attributed to them, and damages should be measured by reference to the usual common law rules for measurement of damages to real property. *See Banks* v. *Chicago Grain Trimmers Association*, 390 U.S. 459, 465 (1968); *Leyerly* v. *United States*, 162 F.2d 79 (10th Cir. 1947). These rules are accurately set forth in the RESTATEMENT (SECOND) of TORTS § 929(1) (1979):

> "If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for

16. We are aware of no cases interpreting the provisions of the FWPCA or OCS Lands Act for recovery of damages for restoration or replacement of natural resources.

> (a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred,
> (b) the loss of use of the land, and
> (c) discomfort and annoyance to him as an occupant."

Sections (b) and (c) of RESTATEMENT § 929(1) are inapplicable here. Plaintiffs did not claim loss of use or loss of any personal or aesthetic values, for West Mangrove is far from pristine and has never yielded rents or profits. Its only inhabitants are two derelicts known as the Hermit and the Dogman, and the latter's "large collection of canine acquaintances." (4a, n.5). These hermits of West Mangrove are not plaintiffs and did not claim any legal interest in the property. *(Id.)*

The circumstances of the instant case clearly come within the rule of Comment b to RESTATEMENT § 929(1), which provides, in pertinent part:

> "If . . . the cost of replacing the land in its original condition is disproportionate to the diminution in the value caused by the trespass, unless there is a reason personal to the owner for restoring the original condition, *damages are measured only by the difference between the value of the land before and after the harm."* (Emphasis added.)

This "diminution rule" has been accepted and applied by other courts of appeals. *E.g., Associated Stations, Inc.* v. *Cedars Realty and Development Corp.,* 454 F.2d 184, 190 (4th Cir. 1972); *Bowes* v. *Saks & Co.,* 397 F.2d 113 (7th Cir. 1968); *Big Rock Mountain Corp. v. Stearns Roger Corp.,* 388 F.2d 165, 168 (8th Cir. 1968); *see also Cook Industries* v. *Barge UM-308,* 622 F.2d 851 (5th Cir. 1980); *Koninklijke Luchtvaart Maatschaapij. N.V.* v. *United Technologies Corp.,* 610 F.2d 1052 (2d Cir. 1979); *O'Brien Brothers, Inc.* v. *The Helen B. Moran,* 160

F.2d 502, 506 (2d Cir. 1947); *Missouri Baptist Hospital* v. *United States,* 555 F.2d 290 (Ct. Cl. 1977); *Gila River Pima-Maricopa Indian Community* v. *United States,* 467 F.2d 1351, 1357 (Ct. Cl. 1972); *Dodge Street Building Corp.* v. *United States,* 341 F.2d 641, 644 (Ct. Cl. 1965); *The Nyland,* 164 F.Supp. 741, 743 (D. Md. 1958); *DeArmon* v. *St. Louis,* 525 S.W.2d 795, 800 (Mo. App. 1975).

Further, with the exception of cases involving a "reason personal to the owner for restoring the original condition,"[17] damages for harm to natural resources have consistently been based upon the resources' commercial or market value and limited by the diminution rule. *See Wm. G. Roe & Co.* v. *Armour & Co.,* 414 F.2d 862 (5th Cir. 1969) (oranges); *Reynolds Metals Co.* v. *Lampert,* 316 F.2d 272 (9th Cir. 1963) (flowers); *W. H. Elliott & Sons Co.* v. *E. & F. King & Co.,* 291 F.2d 79 (1st Cir. 1961) (roses); *Douglas Aircraft Co.* v. *Kerns,* 164 F.2d 1007, 1010 (10th Cir. 1947) (stream); *State Department of Environmental Protection* v. *Jersey Central Power and Light Co.,* 125 N.J. Super. 97, 308 A.2d 671 (1973), *aff'd,* 133 N.J. Super. 375, 336 A.2d 750, *rev'd on other grounds,* 69 N.J. 102, 351 A.2d 337 (1975) (fish); *Baillon* v. *Carl Bolander & Sons Co.,* 396 Minn. 155, 235 N.W.2d 613 (1975) (trees); and *Maldonado* v. *Connecticut Light & Power Co.,* 31 Conn. Sup. 536, 328 A.2d 120, 121 (1974) (shade tree).

The court below rejected this vast body of law and authorized the recovery of damages disproportionate to both the diminution in value of the affected property and the actual market value of the land. For this reason, we respectfully submit that the writ of certiorari should be granted to review this decision, since it is in direct and irreconcilable conflict with decisions of other federal courts of appeals and

17. RESTATEMENT (SECOND) OF TORTS § 929, Comment b (1979); *see, e.g.,* Heninger v. Dunn, 101 Cal. App. 3d 858, 162 Cal. Rptr. 104 (1980); Rector Wardens & Vestry of St. Christopher's Episcopal Church v. C. S. McCrossan, Inc., 306 Minn. 143, 235 N.W.2d 609 (1975).

constitutes such a departure from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

The court of appeals' clear departure from this Court's recent ruling on the tests for asserting jurisdiction over nonresidents, its creation of a right of direct action not authorized by statute, and its promulgation of standards for measuring environmental damages in conflict with the traditional rules accepted by other federal courts of appeals, all call for review by this Court.

We therefore submit that a writ of certiorari should be granted, and, on the merits of this petition, that (1) the action should be dismissed as to the West of England defendants and (2) plaintiffs' claim for environmental damages should also be dismissed.

Respectfully submitted,

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November 10, 1980

80-758

Supreme Court, U. S.
FILED
NOV 10 1980
MICHAEL RODAK, JR., CLERK

No. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE S.S. ZOE COLOCOTRONI, MARBONANZA COMPANIA NAVIERA, S.A., COLOCOTRONI LTD., COLOCOTRONI BROTHERS, S.A., THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG) and THE WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LONDON) LIMITED,

Petitioners,

-against-

THE COMMONWEALTH OF PUERTO RICO and THE ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO,

Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INDEX TO APPENDIX

	PAGE
Opinion of the Court of Appeals, filed August 12, 1980	1a
Opinion of the Court of Appeals, filed July 10, 1979	49a
Memorandum and Order of the Court of Appeals, filed June 11, 1979	55a
Opinion of the District Court, filed August 16, 1978, as amended by Order filed October 4, 1978	57a
Opinion and Order of the District Court, filed October 21, 1977	103a
Opinion and Order of the District Court, filed January 14, 1977	109a
Order of the District Court, filed November 7, 1975	119a
Order of the District Court, filed September 17, 1975	121a
Order of the District Court, dated April 11, 1974	122a
Order of the District Court, dated April 8, 1974	124a
Magistrate's Report and Recommendation, dated March 21, 1974	126a
Memorandum Opinion and Order of the District Court, filed January 31, 1974	137a
Order of the District Court, filed July 3, 1973	152a
Order of the District Court, dated June 19, 1973	155a
Judgment entered August 12, 1980	159a
Constitutional and Statutory Provisions Involved	160a
Amendment XIV to the Constitution of the United States, Section 1	160a
Section 11(29) of the Public Policy Environmental Act of the Commonwealth of Puerto Rico, 12 L.P.R.A. § 1131(29) (1978)	160a
Rule 4.7 of the Puerto Rico Rules of Civil Procedure (Puerto Rico Long-arm Statute), 26 L.P.R.A., App. II, R. 4.7 (1977)	161a
Section 20.030 of the Puerto Rico Insurance Code (Puerto Rico Direct Action Statute), 26 L.P.R.A. § 2003 (1977)	162a
Section 11.190 of the Puerto Rico Insurance Code, 26 L.P.R.A. § 1119 (1978)	163a

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 78-1543 and No. 79-1468

COMMONWEALTH OF PUERTO RICO, *et al.*,
Plaintiffs, Appellees,

v.

THE SS ZOE COLOCOTRONI,
HER ENGINES, APPURTENANCES,
etc., *et al.*,
Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Argued: March 10, 1980
Filed: August 12, 1980

Before COFFIN, *Chief Judge,*
CAMPBELL, *Circuit Judge,* and
WYZANSKI,* *Senior District Judge.*

CAMPBELL, *Circuit Judge.* In the early morning hours of March 18, 1973, the SS ZOE COLOCOTRONI, a tramp oil tanker, ran aground on a reef three and a half miles off the south coast of Puerto Rico. To refloat the vessel, the cap-

* Of the District of Massachusetts, sitting by designation.

tain ordered the dumping of more than 5,000 tons of crude oil into the surrounding waters. An oil slick four miles long, and a tenth of a mile wide, floated towards the coast and came ashore at an isolated peninsula on the southwestern tip of the island—a place called Bahia Sucia. The present appeal concerns an action in admiralty brought by the Commonwealth of Puerto Rico and the local Environmental Quality Board (EQB) to recover damages for harm done to the coastal environment by the spilled oil.[1]

Defendants[2] have raised numerous objections to the district court's judgment awarding plaintiffs $6,164,192.09 in damages for cleanup costs and environmental harm. The primary objections are that the district court: (1) abused its discretion in striking defendants' pleadings on the issue of liability as a sanction for defendants' conduct during the discovery process; (2) erred in considering depositions of the ship's master and crew on the issue of liability and in making findings as to liability after that issue had been removed from the case; (3) lacked personal jurisdiction

1. Several other actions that were initially consolidated with this one have been settled or adjudicated. The United States recovered $840,366.01 in cleanup costs, interest and statutory penalties against the owners of the oil tanker; we refused to enlarge this award by adding attorney's fees and additional prejudgment interest. *United States* v. *M/V Zoe Colocotroni,* 602 F.2d 12 (1st Cir. 1979). Local fishermen and owners of a nearby salt pond settled their claims for property damage and lost income for $55,000 and $75,000 respectively. A local hotel's claim for riparian damages and loss of business was also settled, for $13,500.

2. Defendants in this action are the SS ZOE COLOCOTRONI (in rem); the owners—Marbonanza Compania Naviera, S.A., Colocotroni, Ltd., and/or Colocotroni Brothers, S.A.; and the insurance underwriters—the West of England Ship Owners Mutual Protection and Indemnity Association (hereinafter West of England-Luxembourg) and the West of England Ship Owners Mutual Insurance Association (hereinafter West of England—London). The two West of England firms (hereinafter collectively West of England) were sued under Puerto Rico's direct action statute, 26 L.P.R.A. § 2003, as insurers of the ZOE COLOCOTRONI and her owners. West of England's contention that the district court lacked personal jurisdiction over the two firms is discussed in Part IV *infra.*

over the underwriters West of England-Luxembourg and West of England-London; (4) erred in finding plaintiffs had standing to sue for environmental damages; (5) applied the wrong standard in measuring damages; (6) made certain erroneous findings of fact on damages; and (7) erred in denying defendants' Rule 60 motion for relief from judgment.[3] The facts and circumstances of the oil spill and its aftermath are set forth in detail in the district court's opinion, *Commonwealth of Puerto Rico* v. *SS Zoe Colocotroni,* 456 F. Supp. 1327 (D.P.R. 1978). After a brief review of these facts and of the trial testimony, we will address defendants' contentions in turn.

I.

The following facts found by the district court are not in serious dispute. On March 15, 1973, the ZOE COLOCOTRONI departed La Salina, Venezuela, carrying 187,670 barrels of crude oil en route to Guayanilla, Puerto Rico. For the first two days of the voyage, the vessel pro-

3. Defendants also argue that receipt by the Commonwealth of a $162,194 grant from the Environmental Protection Agency (EPA) for litigation expenses in connection with the Bahia Sucia oil spill constituted "maintenance" in the common law sense. In the alternative, defendants argue the amount of the grant should be set off against any recovery to which the plaintiffs may be entitled. These arguments are specious. *See generally* Corbin on Contracts § 1423 (no illegality in assisting another to maintain a suit by advancing the money to pay costs and expenses, even as a gift, if the advancement is made for reasons of charity or friendship and not for profit). Section 106 of the Federal Water Pollution Control Act, 33 U.S.C. § 1256(a), provides that EPA may grant funds to states "for the prevention, reduction, and elimination of pollution, including enforcement directly or through appropriate State law enforcement officers or agencies." The regulations define "enforcement" to include "litigation support activities." 40 C.F.R. § 35.1513-5(c)(8). A statutorily authorized government grant intended to further the purposes of a valid statute does not constitute "maintenance" by the United States. *Cf. Mitchell* v. *Mitchell Truck Line, Inc.,* 286 F.2d 721, 727 (5th Cir. 1961) (Secretary of Labor's solicitation or minimum wage complaints pursuant to statutory scheme not "barratrous").

ceeded by celestial navigation. The last star fix, however, was taken at 1859 hours on March 17. For the next eight hours, the ship proceeded by dead reckoning. As the vessel approached the south coast of Puerto Rico, it was, the district court stated, "hopelessly lost." At 0300 hours on March 18, the ship grounded on a reef. Efforts to free the tanker by alternately running the engines in forward and reverse were unsuccessful. After ten minutes, the captain ordered the crew to lighten ship by emptying the cargo of crude oil into the sea.[4] By the time the vessel refloated, some 1.5 million gallons of crude oil—5,170.1 tons—had poured into the surrounding waters.

The oil floated westward from the site of the spill throughout the daylight hours of March 18, and began coming ashore after nightfall. Bahia Sucia is a crescent-shaped bay facing southeastward from the Cabo Rojo peninsula, which forms the southwest tip of Puerto Rico. The oil entered Bahia Sucia, washed onto the beaches, and penetrated the mangrove forests that line the western edge of the bay. The oil was particularly thick in three areas: around the rocky tip of the peninsula, in a section of mangroves known as West Mangrove between a point called "Hermit One" and an inlet called "Dogman's Cove,"[5] and on the open beach area stretching along the northern edge of the bay. In addition, as the tide ebbed and flowed, oil entered the tidal flats behind the mangrove fringe, coating the roots of mangroves growing deeper in the forest and soaking into the sediments.

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4. The captain was ultimately tried and convicted on a charge of violating 33 U.S.C. § 1321(b)(5) in connection with the dumping of the oil. 456 F. Supp. at 1333 n.9.

5. Two hermits—Hermit One and the Dogman—lived in the West Mangrove area at the time of trial, the Dogman being so called because of his large collection of canine acquaintances. Neither hermit claimed any legal interest in the property. Various local topographical features were identified in court by reference to these two eponymous individuals.

A massive cleanup operation, coordinated by the United States Coast Guard and several Commonwealth agencies, commenced on the morning of March 19. Cleanup crews, hampered to some extent by variable winds that blew oil back and forth across the bay, used booms to attempt to contain oil floating on the surface. Much of this oil was pumped out, either directly from the water or from large holes dug in the beach into which oil was channeled by the cleanup crews. By March 29, approximately 755,000 gallons of oil, or about half the amount spilled, had been recovered. On several occasions during the cleanup, oil was driven by winds and currents into the eastern edge of the bay in an area known as East Mangrove. This thin layer of oil was difficult to remove, but, according to the district court's findings, it caused little or no harm to the East Mangrove forest.

By April, cleanup activities had switched from large-scale removal of oil to small-scale activities such as manual beach cleanup and bailing of oil from tidal pockets with buckets and small boats. Large amounts of contaminated sands—totaling about 4,500 cubic yards—were removed from the beach area by bulldozer and by hand. At the end of April, the major remaining cleanup efforts were halted, and all further efforts were discontinued after September 24. Despite the cleanup, oil continued to be present in Bahia Sucia, especially in the stand of mangroves on the west side of the bay.

One of the plaintiffs' expert witnesses, Dr. Ariel Lugo Garces, a wetlands specialist, testified that the ecological functions of a mangrove forest such as that at Bahia Sucia included: (1) protecting the shoreline from erosion, storms, tides, and high winds; (2) providing a habitat for wildlife, especially birds; (3) providing a protected breeding ground for fish and shellfish; and (4) acting as a food source for aquatic creatures of all kinds. Dr. Roger D. Anderson, a marine biologist who testified for defendants, agreed with

Dr. Lugo that tropical mangroves are an important link in the food chain that supports fisheries and other marine resources.

The district court described the Bahia Sucia mangroves as follows:

> "The mangrove that borders on the ocean fringe throughout Bahia Sucia is a species referred to as red mangrove (*Rhizophora mangle*). This mangrove has both main and prop roots, in which are located lenticels or pores for gas exchange. These lenticels facilitate root respiration. Various epibenthic species such as tree oysters, snails, crabs, sponges and molluscs dwelled in these root systems. In the waters surrounding these roots, communities of fish, shrimp and similar floating or swimming organisms throve. The bottom around the roots was inhabited by various benthic infauna. The bottom near the red mangrove was covered with both turtle grass . . . and manatee grass. . . .
>
> Further inland from the fringe, as the interstitial salinity rises, the red mangrove is supplanted by the black mangrove (*Avecennia nitida*). This mangrove inhabits a zone systematically flooded by the tide, and rather than prop roots, it has fingerlike breathing tubes (called neumatafors) which rise from the ground to above high water level. This area provided a habitat principally for crustaceans such as crabs and barnacles, and algae grazing snails, bees and reptiles. There were also benthic infaunal communities similar in nature to those in the bottom surrounding the red mangrove fringe."

456 F. Supp. at 1338 (footnotes omitted).[6] The district

6. In the district court, the terms "benthic infauna" and "infaunal creatures" were used to describe creatures such as worms or clams living in or under the sediment beneath the mangroves. The term

court noted that the configuration of Bahia Sucia, together with the prevailing winds and currents, made the bay a natural trap for floating debris, including small quantities of petroleum and tar.[7] Nevertheless, the court found that, at the time of the ZOE COLOCOTRONI oil spill, "Bahia Sucia was a healthy, functioning estuarial ecosystem, typical of those found in the Southern coast of Puerto Rico and similar tropical environments." 456 F. Supp. at 1339.

A.

The Commonwealth of Puerto Rico and the EQB instituted the present action on March 19, 1973, invoking the admiralty jurisdiction of the district court. A six-week trial, addressed solely to damages, commenced on November 7, 1977.[8] Plaintiffs first introduced testimony by expert witnesses on the impact of the oil spill on Bahia Sucia, the toxic effects of the oil, and the extent to which oil was still present four years after the spill. Other experts then presented proposals for restoring the area and testified to the costs that would be involved. Rafael Cruz Perez, an engineer, presented a proposal to remove and replace a total of 164,600 square meters (approximately 40 acres) of oil-contaminated sediments in the West Mangrove and East Mangrove areas to a depth of one meter. While the details of the Cruz Perez plan were somewhat sketchy, the geo-

---

"epibenthic" was used to describe creatures such as shrimp or crabs that live just above the surface of the sediment, whether in or out of the water. While defendants have questioned the accuracy of this terminology on technical grounds, we believe the intended meaning of these terms is clear enough in the record, and we will use them in the same fashion as the district court.

7. Indeed, the literal English translation of Bahia Sucia is "dirty bay."

8. On the first day of trial, the district court judge and counsel for the parties made an on-site visual inspection of the Bahia Sucia shoreline.

graphic areas to be affected by the plan apparently consisted of the following. Of the 40 acres of contaminated sediments to be removed, about 15 acres were on the west side of the bay in the vicinity of West Mangrove and about 25 acres were on the east side in the vicinity of East Mangrove. Of the 15 acres on the west side, about 3.5 acres contained mangroves, approximately half of which were alive notwithstanding the polluted sediments. Of the 25 acres to be removed on the east side, about 16.5 acres contained mangroves. Cruz Perez thus estimated his plan for removal of 40 acres of contaminated sediments would necessarily entail the clearing of some 20 acres of existing mangroves. Furthermore, Cruz Perez testified, three additional acres of mangroves in uncontaminated areas would have to be cleared to provide access for heavy machinery.[9] An engineering report submitted by Gabriel Fuentes, a contractor, estimated the cost of removing the sediments and mangroves to be $7,176,363.71. Charles Pennock, a San Juan nurseryman, submitted an estimate of $559,500 for the replanting of 23 acres of mangroves from container-grown plants (approximately 5,500 trees per acre) and a five-year maintenance plan.

Dr. Roger J. Zimmerman, a marine biologist from the University of Puerto Rico, testified concerning a study he conducted in late 1976 and early 1977 comparing the number of living organisms found at Bahia Sucia with the number found in a comparable control area. Dr. Zimmerman's study established no significant differences in num-

9. Cruz Perez testified that he made his calculations working from aerial photographs and from on-site observations. Cruz Perez's study showed the size of the various impacted areas in numbers of square meters. We have translated these figures into numbers of acres for ease of reference. According to Cruz Perez's figures, there were a total of about 12 acres of mangroves in the West Mangrove area, of which about half were living mangroves in unaffected sediments. The figures suggest there were also about 2.5 acres of dead mangroves not impacted by oil. For a further discussion of the significance of these numbers, see note 25 *infra*.

ber or type of organisms—either plants or animals—in the seagrass beds or on the prop roots of the mangroves. The study did, however, show a substantial disparity in the number of organisms living on or under the sediments. In particular, Dr. Zimmerman stated that the number of molluscs (e.g., clams, snails) in the Bahia Sucia area was very small in comparison to the control area. On the other hand, samples taken in Bahia Sucia found a far larger number of polychaete worms, especially a genus known as capitella which often proliferates in areas of acute environmental distress.

Dr. Zimmerman also testified that, subsequent to this first survey, a second study was undertaken at the behest of the Environmental Quality Board. This study, again relying on core samples taken in Bahia Sucia and at a control site, concentrated on the sediments, where the first survey had found the greatest impact from the oil. Dr. Zimmerman stated that the surveyors took their samples primarily from the vicinity of a small lagoon in the West Mangrove area where previous studies and visual observation indicated the oil was heavily concentrated. This study revealed a marked difference between the two sites in the numbers of infaunal and epibenthic creatures, according to Dr. Zimmerman.

Dr. Ariel Lugo Garces, the wetlands expert, testified to studies he had made indicating the presence of oil in the mangrove sediments correlated with dead or dying mangrove trees. The mangroves would not grow back, Dr. Lugo said, as long as the oil remained in the sediments. Dr. Lugo also presented a compilation, prepared by him, of the data gathered by the other Bahia Sucia surveyors, summarizing the extent of damage to twelve different components of the Bahia Sucia ecosystem. Dr. Lugo stated that he considered his figures conservative, since little data was available on many other environmental components.

Finally, Dr. Philip E. Sorensen, an economist specializing in natural resources, discussed the economic theory that shippers of oil should be required to bear such external social costs as oil spill damages in order to prevent underpricing of their product. "If the producers and consumers of oil are able to conduct their affairs in such a way as to transfer to society a large part of the real cost of producing and consuming their product," Dr. Sorensen said, "we'll be in an inefficient economic situation: one in which the market price of the commodity will be less than the full social cost of producing it." Dr. Sorensen also presented a summary of plaintiff's claims for damages, including *inter alia* the Commonwealth's uncontested claim for cleanup expenses of $78,108.89, the $7.5 million for sediment removal and mangrove replanting, and Dr. Sorensen's own estimate of $5,526,583 as the replacement value of the invertebrate organisms killed by the oil spill.

Dr. Sorensen testified he arrived at the latter figure by way of the following calculations. Dr. Lugo's report had compiled the results of earlier studies together with the second Zimmerman survey to provide a table of environmental harms. Concentrating only on the figures from the Zimmerman study, Dr. Sorensen extrapolated the differences in number of organisms found in the ten-centimeter core samples over a square meter area to determine the net difference in creatures per square meter. Since six samples were taken at each of the four "stations" in Bahia Sucia and in the control area, he determined this involved multiplying the results of each set of six samples by 21.22. Results from one of the four stations, where more animals were found at Bahia Sucia than at the control area, were not included. The net difference was calculated to be 1,138 creatures per square meter. This figure in turn yielded the sum of 4,605,486 creatures per acre, and a total of 92,109,720 creatures for the 20 acres of mangroves allegedly impacted by oil. Dr. Sorensen testified that he

took the 20-acre figure from "the survey and the map created by Mr. Cruz Perez" and that the 20 acres included a substantial area in East Mangrove.

To arrive at an estimate of damages, Dr. Sorensen testified he consulted catalogs from biological supply houses. From these catalogs he determined that "[m]any of these species sell at prices ranging from $1 to $4.50" and "that no animal on the list sold for less than 10 cents."[10] Dr. Sorensen assigned an average replacement value to each creature, regardless of species, of six cents. Multiplying 92,109,720 times .06 resulted in an estimate of $5,526,583 as the replacement value of the organisms "missing" from the Bahia Sucia sediments. Dr. Sorensen also estimated the cost of a ten-year scientific monitoring program at $1,393,200. His total estimate of the damages was thus $14,733,755.60, consisting of $7,176,363.71 for mangrove and sediment removal, $559,500 for mangrove replanting, $5,526,583 for the replacement value of organisms, $1,393,200 for monitoring, and $78,108.89 for cleanup costs.

B.

Plaintiffs' witnesses were thoroughly cross-examined by defendants' counsel. In addition, defendants presented considerable expert testimony of their own. The primary thrust of this testimony was that the oil originally present in Bahia Sucia had "weathered" through the action of wind, waves, sunlight and the elements and was no longer having major toxic effects on the environment. Defendants' experts also testified that some of the damaged mangroves were victims of pre-existing high salinity in West Mangrove rather than oil pollution. Further testimony indicated that,

10. Dr. Sorensen did not testify that the biological supply houses actually procured specimens at Bahia Sucia or that the Bahia Sucia animals were marketable through such outlets. He only stated that creatures similar to those killed could be replaced by purchasing them from the catalogs.

in the opinion of defendants' experts, there were substantial signs of natural regeneration among the mangroves. Dr. Edward S. Gilfillan testified, for example, that he expected the area to be restored by natural processes within ten to fifteen years, if not less. He estimated the size of the area of "continuing damage" in West Mangrove at two and a half to three acres.

Defendants also offered alternative restoration or reforestation programs of their own that were less extensive or less costly than plaintiffs' proposals. Dr. Howard Teas, a biologist, testified that, in his opinion, it would be possible, though not necessarily desirable, to remove oil from the sediments without destroying existing vegetation by using "an airlift or vacuum such as divers use in unearthing treasure ships." A preferable alternative, Dr. Teas said, would be to offset damage to the oil-impacted mangroves by replanting trees at a nearby location where the mangrove forest had existed several years before. This proposal would not carry with it the same risk of totally destroying the environment in the contaminated areas in order to save it, Dr. Teas said. He suggested that construction of a canal system to provide sufficient "flushing" action would permit reforestation of the area west of Bahia Sucia and north of the Cabo Rojo lighthouse where excess salinity had apparently killed the mangroves. Dr. Teas testified that the cost of replanting 15 acres of mangroves through methods with which he was familiar would be approximately $75,000 ($5,000 per acre), and that the cost of a ten-year monitoring program would be about $200,000.

Dr. Roger D. Anderson, a marine biologist testifying for defendants, attacked Dr. Sorensen's theory of replacement value as the measure of damages for small, commercially valueless invertebrate animals. Dr. Anderson offered as an alternative his own methodology, based on studies conducted in Georgia. Citing work done by some of plaintiffs' experts as well as other scientists, Dr. Anderson estimated

the value of an acre of tropical mangrove swamp to be $50,000, based on a complex analysis of the potential significance of such land to food supply, energy supply, fisheries, wood products, aesthetics, recreation and similar factors. From his analysis of other evidence produced at trial, Dr. Anderson testified he considered about three acres of the West Mangrove area to be a total loss, thus producing a damage figure of $150,000. He stated, however, that his estimate of $50,000 was a "yardstick" which could be applied to any number of acres of mangroves that plaintiffs could show had been substantially damaged. Dr. Anderson pointed out that plaintiffs' expert Dr. Lugo had written a paper, on which Dr. Anderson partly relied, putting a more conservative valuation of $35,000 to $40,000 per acre on the mangroves of Bahia Sucia.

Dr. Anderson also offered to testify in behalf of defendants' proposal that, as an alternative to massive replanting in the West Mangrove area, reforestation of the Cabo Rojo peninsula could be attempted. He stated that he was familiar with this technique of alternate-site restoration, and that it had been used in several states as a condition for permitting activities that would result in destruction of certain areas of marshland. Dr. Anderson's testimony on this point was excluded on grounds of irrelevancy. "I am involved here, solely, with establishing a dollar amount of damages," the court said. "[W]hether as an alternate remedy in the settlement, the restoration of other mangroves, or of these mangroves . . . could be proposed is outside the scope of this case; unless I am shown something to the contrary."

Finally, defendants presented testimony by David R. Stith, a marine contractor with experience in oil spill cleanup operations, including the Bahia Sucia cleanup. Stith testified he had prepared an estimate of the cost of removing the oil-contaminated sediments from 2.6 to 2.9 acres of the West Mangrove area using a suction device mounted on

a floating barge. His estimate for this work totaled $396,859. Stith also offered to testify he had estimated the cost of constructing a channel system as proposed by Dr. Teas for replanting at the Cabo Rojo lighthouse. This estimate was $152,310. As with Dr. Anderson's, the district court excluded this testimony as irrelevant since it did not concern the damaged area. The total of defendants' proposed remedial measures was just under $1 million.

C.

The district court made the following findings on the issue of damages:

> "1. Plaintiffs' proven claim of damage to marine organisms covers an approximate area of about 20 acres in and around the West Mangrove. The surveys conducted by Plaintiffs reliably establish that there was a decline of approximately 4,605,486 organisms per acre as a direct result of the oil spill. This means that 92,109,720 marine animals were killed by the COLOCOTRONI oil spill. The uncontradicted evidence establishes that there is a ready market with reference to biological supply laboratories, thus allowing a reliable calculation of the cost of replacing these organisms.[42] The lowest possible replacement cost figure is $.06 per animal, with many species selling from $1.00 to $4.50 per individual. Accepting the lowest replacement cost, and attaching damages only to the lost marine animals in the West Mangrove area, we find the damages caused by Defendants to amount to $5,526,583.20.
>
> 2. The evidence is overwhelming to the effect that the sediments in and around the West Mangrove continue to be impregnated with oil. The solutions proposed by Plaintiffs to this problem are unacceptable in that they would bring about the total destruction of this environment without any real guarantee of ultimate success. Furthermore, there is substan-

tial scientific evidence to the effect that much of the undesirable effects of the oil in the sediments will be corrected in time by the weathering processes of nature. The most affected spots in the West Mangrove cover an area of approximately 23 acres. It is the Court's opinion that these areas can best be reestablished by the intensive planting of mangrove and restoration of this area to its condition before the oil spill. The evidence shows that the planting of mangrove runs at about $16,500 per acre, thus bringing the cost of replanting 23 acres to $379,500. The evidence further demonstrates that the planting will require a five year monitoring and fertilizing program which will cost $36,000 per year or $180,000 for the five years. The total damages thus suffered by Plaintiffs by reason of the pollution of the mangrove in the West Mangrove amount to $559,500.

3. Plaintiffs incurred in cleanup costs in the amount of $78,108.89 which were not reimbursed from any source, and they are entitled to recover said damages from Defendants.

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42. As explained previously, the affected flora and fauna were part of a trust held for the people by the Commonwealth of Puerto Rico. See, *Lacoste* v. *Department of Conservation,* 263 U.S. 545, 549, 44 S.Ct. 186, 68 L.Ed 437 (1924); *Geer* v. *Connecticut,* supra. Perforce, the Commonwealth must have the ability to have the corpus of said public trust reimbursed for the diminution attributable to the wrongdoers. *State Dept. of Environmental Protection* v. *Jersey Central Power & Light Co.,* supra, at 673-674. We recognize that no market value, in the sense of loss of market profits, can be ascribed to the biological components of the Bahia Sucia ecosystem. The Court will thus refer to market cost as the most reliable evidence of the quantum of damages actually sustained, i.e., what is required to make the Plaintiffs whole. This will compromise the cost of restoring the affected areas to the condition in which they were before the occurrences. See *Feather River Lumber Co.* v. *United States,* 30 F.2d 642, 644 (C.A. 9, 1929)."

456 F. Supp. 1327, 1344-45 & n. 42 (D.P.R. 1978).

The judgment of the district court was entered August 22, 1978. During the pendency of their appeal from this judgment, defendants filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)[11] and for correction of the record pursuant to Fed. R. Civ. P. 60(a). These motions were denied in the district court by order dated August 10, 1979. Defendants' appeal from this order has been consolidated with the pending appeal of the original judgment.[12]

II.

Defendants first contend the district court abused its discretion by striking their pleadings on the issue of liability and their petition for exoneration from and limitation of liability.[13] Defendants argue that this sanction—which amounted to a default judgment on liability and left open only the question of damages—was an unreasonably harsh penalty for any pretrial misconduct they may have engaged in.

The district court acted pursuant to Fed. R. Civ. P. 37(b), which provides that where a party has failed to obey a

11. *See Commonwealth of Puerto Rico* v. *SS Zoe Colocotroni*, 601 F.2d 39 (1st Cir. 1979).

12. In light of our disposition of this case, we do not reach defendants' appeal from the district court's denial of their Rule 60 motions. On remand, defendants are free to resubmit to the district court such of the evidence supporting their Rule 60 motions as is relevant to the issues remaining to be decided.

13. The Limitation of Liability Act of 1851, 46 U.S.C. § 183, provides that in the event of an accident "incurred without the privity or knowledge" of the vessel owner, the liability of the owner for property damage "shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." Defendants petitioned pursuant to 46 U.S.C. § 185 to have their liability limited to $650,000—the amount deposited with the court as security for the vessel. For a discussion of the Act as it relates to oil pollution litigation, see Mendelsohn & Fidel, *Liability for Oil Pollution-United States Law*, 10 J.Mar.L. & Com. 475, 475-477 (1979).

discovery order, the court "may make such orders in regard to the failure as are just, and among others the following:

> "(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) *An order striking out pleadings or parts thereof,* or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . . ." (Emphasis added.)

The Supreme Court has stated that the appropriate standard of review for orders of this nature "is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (per curiam); *see also Luis C. Forteza e Hijos, Inc.* v. *Mills*, 534 F.2d 415, 410 (1st. Cir. 1976). The question is whether the district court's findings "are fully supported by the record." 427 U.S. at 642.

In the present case, the district court found that defendants had exhibited "bad faith and a callous disregard of their responsibilities in this litigation." Defendants' conduct, which the district court characterized as "an affront to this Court's dignity," was found to have severely prejudiced plaintiffs' preparation of their case as well as the court's attempts to ensure that the trial proceeded as sche-

duled. These conclusions were based on the following facts, which appear in the record.

On June 7, 1977, the magistrate convened a status conference at which it was agreed by all parties that discovery in this long-pending case would be completed by August 1 in contemplation of a September 7 pre-trial conference and a November 7 trial date. Depositions of the defendant corporations were scheduled to be taken in Puerto Rico on July 5, 6 and 7. A further status conference was slated for August 17. The depositions were duly noticed on June 13.

On July 5, 1977, without prior notice, defendants' corporate officials failed to appear for the scheduled deposition sessions. At plaintiffs' request, the magistrate convened an in-chambers conference the same day to consider what response to make. At that meeting, counsel for defendants stated that, contrary to the earlier agreement, his clients were only willing to be deposed in England in August. The court ordered defendants' counsel to ascertain by July 11 whether his clients would be amenable to appearing in Puerto Rico for depositions during the week of July 26. A second magistrate's hearing was set for July 11, at which time counsel for plaintiffs, if they so desired, were to move for sanctions and attorneys' fees.[14]

On July 11, 1977, the court was informed that the parties had agreed to reschedule the aborted depositions for August 3, 4 and 5, 1977, and that they would be conducted in Puerto Rico. The magistrate's hearing was cancelled and two days later the district court extended the discovery deadline to August 31, indicating that no further alterations in the pre-trial schedule would be allowed. At the request of the United States, the depositions scheduled for August 3, 4 and 5 were eventually moved, with the consent of all parties, to August 17, 18 and 19. Appropriate notices were

14. Such a motion was in fact made, and on July 29, 1977 the court ordered defendants to pay $467.25 to the United States and $750 to the Commonwealth of Puerto Rico and the EQB. No appeal was taken from that order.

served August 10, and the court gave formal approval to the change on August 15.

On August 16, counsel for defendants, A. Santiago Villalonga, phoned counsel for the Commonwealth of Puerto Rico to inform him that defendants' witnesses did not intend to appear the next day. The witnesses' appearances would be superfluous, he said, because defendants intended to admit liability. This concession was repeated to the magistrate on the 17th of August by Francisco Bruno, who was substituting for Santiago as defendants' counsel at the status conference previously slated for that day. Like Santiago, Bruno asserted that the admission of liability obviated the need for taking further depositions.

At this time, counsel for the United States raised, among others, the question whether defendants' admission of liability extended to a waiver of defendants' petition to limit liability to the value of the vessel and cargo. When defendants' substitute counsel was unable to provide a clear answer, the magistrate ordered defendants to file a written admission of liability within fifteen days. The magistrate also agreed to reschedule the pre-trial conference from September 7 to October 25 and confirmed that the trial—now thought to be limited to the damages issue—would still commence on November 7.

Defendants did not file a written admission of liability within fifteen days, as ordered, nor did they file any paper explaining their behavior. When the magistrate learned that no admission had been filed, he ordered a Some Disposition Conference for October 7, 1977 to determine the present status of the matter. At the conference, defendants' counsel stated, for the first time, that the August 17 admission of liability was neither authorized by all the defendant companies nor unlimited as to amount. Rather, said Santiago, the admission was intended to extend only to the amount of the bond for the vessel—$650,000. The magistrate thereupon ordered each defendant either to ad-

mit liability without limit as to amount—except for the limits of applicable insurance policies—by October 14, or to produce witnesses for deposition on October 17.[15] Defendants were explicitly warned that failure to comply with this order could result in the striking of their pleadings and of the petition for limitation of liability.

On October 14, 1977, instead of admitting liability, defendants moved for a postponement for one week of the depositions set for October 17, and a rescheduling of the pre-trial conference slated for October 25. On October 17, plaintiffs moved the court to strike defendants' pleadings on liability, and a hearing before the magistrate was held the same day. After reviewing the facts recited above in detail,[16] the magistrate recommended that defendants' pleadings on

15. Defendants now contend they misunderstood this order and believed the depositions were to be taken October 19. The record contradicts this assertion, however, as defendants' own contemporaneous submissions, with one exception, make reference to the October 17 date, and this is the date which appears plainly in the court's written order.

16. Though the magistrate did not explicitly cite earlier conduct of the defendants, plaintiffs assert that defendants' earlier conduct also evidenced their bad faith attitude toward the discovery process. On June 20, 1973, at the outset of the litigation, the court denied a motion by Vicente M. Ydrach, a San Juan attorney representing the West of England firms, to quash a notice of deposition and subpoena duces tecum issued June 5. Despite an order directing Ydrach to comply with the subpoena by June 23, he appeared at his deposition and refused to answer questions or produce documents on the ground of attorney-client privilege. Defendant West of England-Luxembourg was subsequently ordered to deposit all subpoenaed documents with the court so that the magistrate could separate those that were discoverable from those that were privileged. The magistrate's report was issued March 21, 1974. West of England filed eight motions for extension before finally submitting its objections to the magistrate's report on October 11, 1974. On September 17, 1975, the district court, adopting the magistrate's report, ordered West of England to produce the discoverable documents. The order was not obeyed. Plaintiffs moved for sanctions. After a hearing, the district court on November 7 repeated its order to West of England, noting that failure to comply within ten days would result in all pleadings and defenses being stricken, all motions being denied, and a default judgment being entered. This order apparently was obeyed.

liability be stricken, or in the alternative that defendants pay $21,000 to the affected parties plus $500 for each day trial would be delayed by postponing the depositions, originally scheduled for July 5, to October 24. Following a hearing on October 20, the district court adopted the magistrate's recommendation that defendants' pleadings, and their petition for limitation of liability, be stricken.

We believe the record supports the district court's finding that defendants' conduct was inexcusably recalcitrant and that it materially prejudiced plaintiffs' trial preparation and the court's legitimate efforts to keep this protracted lawsuit moving forward. The fulcrum upon which this course of conduct turned was defendants' attempt at the August 17 status conference to avert the scheduled depositions by purporting to admit liability so as to make the depositions unnecessary. Had plaintiffs known the admission of liability was not meant to exceed the $650,000 already deposited in court, they plainly would not have acceded to the cancelling of the depositions. All the parties clearly understood that the "privity and knowledge" of the owners would be a major issue when plaintiffs sought to break defendants' petition for limitation of liability. The manifest purpose of the depositions scheduled for July 5, and later for August 17, was to explore the question of privity, and to try to establish defendants' knowledge of various alleged defects in the ZOE COLOCOTRONI's navigational and safety equipment, If defendants intended to admit liability only within the limits of 46 U.S.C § 183, even though they did not so state, then their assertion that further depositions would be unnecessary was highly misleading. It had the effect of lulling plaintiffs into a false sense that the issue of liability was settled, at the same time the approaching trial date made it increasingly unlikely that sufficient time would be available later for full discovery to be conducted.

Nothing in defendants' conduct subsequent to August 17 in any way cured or mitigated the misleading effect of their purported admission of liability. Ordered to produce a written admission of liability, spelling out the details of their concession, within fifteen days, defendants made *no* formal response. Ordered again, following the Some Disposition Conference, either to admit liability in writing or to produce witnesses for deposition, defendants did neither, but instead at the last moment requested yet another delay. As we said under similar circumstances in affirming the dismissal of a case for want of prosecution, "There comes a point when the question arises who is running the court—counsel, or the judge. To this there can be but one answer." *Higuera* v. *Pueblo International, Inc.*, 585 F.2d 555, 557 (1st Cir. 1978).

Defendants insist the district court exceeded its discretion in striking their pleadings and preventing their defenses from being considered on the merits. They point out that the enforcement of procedural rules through punitive default judgments may offend the standards of due process. *See Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958); *Hovey* v. *Elliott*, 167 U.S. 409 (1897). But the district court's response here was not purely punitive—or "mere punishment" in the words of *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 351 (1909); its actions bore a direct and reasonable relation to the prejudice defendants' irresponsible conduct had already created. *See* 4A Moore's Federal Practice ¶ 37.03 [2.-1] at 37-56. Whether defendants planned all along to limit their unqualified admission of liability, or whether this idea arose as an afterthought, they gained a considerable strategic advantage by their misrepresentations. The district court could protect plaintiffs only by either further delaying trial or by holding defendants to their counsel's original unqualified admission of liability. The latter course, which the court adopted,

was somewhat analogous to the imposing of an equitable estoppel. In the circumstances we see no violation of due process nor any abuse of the court's discretion. *See National Hockey League* v. *Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976); *Hammond Packing Co* v. *Arkansas*, 212 U.S. 322, 350-51 (1909); *Luis C. Forteza e Hijos, Inc.* v. *Mills*, 534 F.2d 415, 419 (1st Cir. 1976); *cf.* Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 Harv. L. Rev. 1033, 1044-45 (1978).

III.

Defendants next argue that the district court's attitude toward them was "poisoned" by the court's unwarranted reliance on depositions of the crew and master of the ZOE COLOCOTRONI to make unnecessary findings on the issue of liability, *see* 456 F. Supp. at 1333-36. Defendants contend that the depositions, which were taken immediately after the vessel docked in Puerto Rico, were not properly introduced as evidence, and that they represented an attempt by the crew and captain to shift blame for the accident from themselves to the owners. Moreover, defendants argue, it was unnecessary for the court to make any findings on liability once it had stricken defendants' pleadings. The only purpose served by such findings, according to defendants, was to prejudice the court on the issue of damages.

We agree that the findings on liability were redundant. It would have been enough if the allegations in the complaint pertaining to liability had been taken as established. The depositions, moreover, had been received only in support of plaintiffs' claim for punitive damages, which was thereafter abandoned. But we are not persuaded that the court's consideration of extraneous liability matters caused undue prejudice or prevented it from fairly deciding the damages issue. As we sustain the court's striking of

defendants' pleadings, nothing more favorable to defendants could have been found than was found on the issue of liability, and we do not think the record displays a judicial attitude that was "poisoned" against the defendants with respect to the issues that remained.[17]

IV.

The West of England defendants, insurers of the ZOE COLOCOTRONI, argue the district court erred in asserting personal jurisdiction over them. The insurers maintain they are outside the reach of the District Court for the District of Puerto Rico because they have no office, sell no insurance, and purportedly transact no business in Puerto Rico. To sustain in personam jurisdiction over a foreign corporation, the court must find both that personal jurisdiction is authorized by the local statute and that the exercise of such jurisdiction does not violate the due process

17. Defendants challenge one further aspect of the district court's findings. Based on the depositions and other exhibits of the crew and master, the court found that the owners knowingly and negligently permitted the ZOE COLOCOTRONI to depart Venezuela in an unseaworthy condition. In their brief, defendants assert that the standard marine insurance contract exempts the insurer from the duty to cover losses engendered by the owners' knowing use of an unseaworthy vessel. Defendants apparently have reference to Rule 30 (b) (ii) of the "Rules and List of Correspondents" of West of England, which provides:

> "Notwithstanding anything contained in Rule 15 or any other agreement between the Association and an insured Owner the insurance afforded by the Association shall not extend to liabilities, costs or expenses *attributable to the willful misconduct* of the insured Owner or his Managers." (Emphasis added.)

The insurers' argument is that it is inconsistent to hold them liable in light of the district court's findings as to the owners' degree of fault.

For purposes of this litigation, which involved no cross-claims between the insurers and the owners, it is enough to say that all the defendants' pleadings on liability were stricken—including the insurers' defenses based on the terms and conditions of the insurance contract. As we have herein upheld the striking of the pleadings, defendant insurers were properly barred from raising this defense against plaintiffs.

requirement that the nonresident defendant will have certain "minimum contacts" with the forum state. *See World-Wide Volkswagen Corp.* v. *Woodson,* 48 U.S.L.W. 4079, 4081 (1980); *International Shoe Co.* v. *Washington,* 326 U.S. 310, 316 (1945). These contacts must be such that the assertion of jurisdiction comports with "traditional notions of fair play and substantial justice.'" *Id., quoting Milliken* v. *Meyer,* 311 U.S. 457, 463 (1940).

Plaintiffs advanced two theories in the district court to justify in personam jurisdiction over West of England. First, plaintiffs argued that documents obtained from West of England's local law firm—Hartzell, Ydrach, Mellado, Santiago, Perez & Novas of San Juan, Puerto Rico (hereinafter Hartzell)—demonstrated that the Hartzell firm was actually West of England's "managing or general agent" in Puerto Rico, such that the firm was impliedly authorized to accept service of process on West of England's behalf. *See* Fed. R. Civ. P. 4 (d) (3); 2 Moore's Federal Practice ¶¶ 4.12, 4.22 [1]. These documents consisted primarily of files of matters handled for defendants by Hartzell, pamphlets listing Hartzell as "correspondent" for defendants, and instructions issued to Hartzell on its duties as a correspondent. The files showed that Hartzell had, among other things, arranged on behalf of West of England and various insured owners for the burial of a deceased Egyptian sailor with appropriate religious observances, for the repatriation by air of several other sailors, and for numerous surveys and other investigations in connection with possible claims for damage or injury. The district court ruled, however, that these activities by Hartzell were so "substantially intertwined with Hartzell's primary professional functions" as defendants' retained law firm that it could not hold Hartzell to be a "managing or general agent" for purposes of accepting service of process on Hartzell's client.

Plaintiffs' second argument was related to the first, but had a narrower focus. Federal Rule of Civil Procedure 4(e)

provides that, constitutional limitations aside, personal jurisdiction may be asserted over a nonresident defendant in the district court to the extent permitted by the long-arm statute of the state in which the court is sitting. *See* 2 Moore's Federal Practice ¶ 4.01 [1]. Puerto Rico's long-arm statute is expressed in Rule 4.7 of the Puerto Rico Rules of Civil Procedure which provides, in pertinent part,

> "(a) Where the person to be served is not within Puerto Rico, the General Court of Justice of Puerto Rico shall have personal jurisdiction over said non-resident as if he were a resident of the Commonwealth of Puerto Rico, if the action or claim arises as a result of the following:
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We think this conclusion is correct. The essential constitutional question is whether West of England "purposefully avail[ed] itself of the privilege of conducting activities within the forum State. thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958). The record makes clear that West of England did precisely that. The Hartzell files revealed numerous

instances in which ships insured by West of England were involved in incidents giving rise to claims or potential claims while the ships were present in Puerto Rican waters. In each of these instances, West of England's local correspondent Hartzell was instructed to take actions to forestall claims, to provide services for the shipowners, or to prepare for any eventual litigation. West of England advertised to insured shipowners the fact that such services would be available through its local Puerto Rican correspondent. The contracts of insurance contained no provision preventing any ship from calling on Puerto Rico, or limiting coverage in the event it did. Not only do we know that vessels mentioned in the Hartzell files visited Puerto Rico, it stands to reason that many other West-insured vessels also did so, as the Hartzell files would name only vessels on which claims or other noteworthy incidents occurred. While West of England was not engaged in selling insurance in Puerto Rico, its retention of the Hartzell law firm to perform services for insured owners and vessels in Puerto Rico demonstrates that West of England plainly expected its worldwide business of insuring maritime risks to embrace the territorial waters of Puerto Rico with some regularity.

In certain ways, this case poses less difficulty than *American & Foreign Insurance Association* [*AFIA*] v. *Commonwealth Insurance Co.*, 575 F.2d 980 (1st Cir. 1978), where we upheld the Puerto Rico district court's jurisdiction over two nonresident insurance companies operating out of Colombia. The district court in AFIA found that the insurance policy in issue covered a large volume of bottles regularly shipped from Colombia to Puerto Rico, and that one of these bottles injured plaintiff when it exploded. As the nonresident insurers knew from the terms of the policy both the volume of bottles being shipped and their destination, we held that the "companies' undertaking to insure a substantial subject of insurance in Puerto Rico was

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West of England contends, however, that its ability to foresee that insured vessels would enter Puerto Rican territorial waters does not, without more, satisfy the "minimum contacts" test of jurisdiction. The Supreme Court has recently stated that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause," *World-Wide Volkswagen Corp.* v. *Woodson*, 48 U.S.L.W. 4079, 4082 (1980). In *Woodson*, plaintiffs brought a products liability action in Oklahoma against the regional distributor and the retailer of an automobile sold in New York but involved in an Oklahoma accident. The Court held Oklahoma's assertion of jurisdiction over the two New York corporations to be a violation of due process, since their only connection with Oklahoma was the fortuity that the car they sold passed through the state after it had left their hands.

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V.

We now turn from procedural matters to the extremely difficult substantive issues concerning damages. Defendants challenge: (A) the so-called "standing" of Puerto Rico and the EQB to recover damages for environmental injury; (B) the district court's failure to limit damages by commercial or market value standards; and (C) the approach and data relied upon by the court in assessing damages.

A.

We turn first to the issue of plaintiffs' right to bring this lawsuit. The district court held that the Commonwealth had "standing" to recover for damages to natural resources, namely the mangrove trees and the various species of marine creatures living in and around them, on the theory that the Commonwealth was the "trustee of the public trust in these resources" and had an interest in them

18. The result we reach is further buttressed by the Supreme Court's occasional suggestions that the test for measuring minimum contracts for insurance companies may be somewhat less stringent than for other nonresident corporations because of the forum state's public policy interest in promoting effective redress for injuries. *See McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957); *cf. Hanson* v. *Denckla*, 357 U.S. 235, 252 (1958). Here the maritime accident resulted in injury to Puerto Rico's coastal environment, and plaintiffs represented this forum-related interest.

as *parens patriae.* 456 F. Supp. at 1337; *see Maryland* v. *Amerada Hess Corp.,* 350 F. Supp. 1060 (D. Md. 1972); *Maine* v. *M/V Tamano,* 357 F. Supp. 1097 (D. Me. 1973); *In re Steuart Transportation Co.,* No. 76-697-N (E.D. Va. 1980). The court also ruled that the Environmental Quality Board had standing to proceed as co-plaintiff seeking similar relief under a state statute authorizing the EQB to bring damages actions for environmental injuries. 456 F. Supp. at 1337; 12 L.P.R.A. § 1131 (29).

While the parties and the district court speak in terms of "standing," we think the question is more properly whether plaintiffs have stated a cognizable cause of action.[19] Defendants concede that Puerto Rico, as owner of the real property primarily affected by the oil spill, *see* 48 U.S.C. § 749, would, like any private landowner, have a cause of action in admiralty to recover whatever damages it could prove under conventional principles for its private economic loss as measured by diminution of market value in the coastal land. *See* 46 U.S.C. § 740. The Commonwealth made no attempt to show such damages, however. It seeks relief instead under an asserted right to recover as a governmental entity on behalf of its people for the loss of living natural resources on the land such as trees and animals.[20]

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19. Plaintiffs' Article III standing is not challenged here, since, assuming plaintiffs have a valid cause of action, they clearly are the proper parties to raise it. *See Davis* v. *Passman,* 442 U.S. 228, 239 & n.18 (1979).

20. We note at this point several questions which are not presented in this case, and on which we express no opinion. First, since the lands in question were all owned by Puerto Rico, we need not decide whether or in what circumstances a state might have a cause of action for environmental harm to privately owned land. Second, since the living natural resources in issue here were all attached more or less permanently to the land, we also do not decide whether any cause of action would accrue, and if so what remedies would be available, where more transitory forms of wildlife such as birds or fish were damaged. Third, this case does not present the issue of overlapping state and federal causes of action. While the Federal

Defendants contend that Puerto Rico's assertion of a recoverable interest in wildlife and other living natural resources is undercut by a line of Supreme Court cases culminating in *Hughes* v. *Oklahoma,* 441 U.S. 322 (1979). *See also Douglas* v. *Seacoast Products, Inc.,* 431 U.S. 265, 284 (1977); *Toomer* v. *Witsell,* 334 U.S. 385, 402 & n.37 (1948); *Missouri* v. *Holland,* 252 U.S. 416, 434 (1920); *cf. Geer* v. *Connecticut,* 161 U.S. 519 (1896). In *Hughes,* the Court formally overruled *Geer* v. *Connecticut,* invalidating on Commerce Clause grounds a state ban on interstate transportation of wildlife lawfully caught in the state and completing the long erosion of *Geer's* theory of state ownership of wildlife. The court recognized, however, that states retain an important interest in the regulation and conservation of wildlife and natural resources. "[T]he general rule we adopt in this case makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th Century legal fiction of state ownership." 441 U.S. at 335-36. Later the Court said, "We consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens." *Id.* at 337.

Plaintiffs argue that a state regulatory interest in wildlife and other living resources, expressed metaphorically in the state's status as "public trustee" of its natural re-

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Clean Water Act of 1977 specifically stated that it did not preempt the imposition by a state of "any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State," 33 U.S.C. § 1321 (o) (2), a problem of double recovery might be raised under some circumstances. Here, however, the United States made no claim for environmental damage (at the time this case arose there was no federal statute authorizing such an action) and asserted no legal interest in the affected lands. The interplay of the state cause of action asserted here with the federal remedial legislation discussed *infra* is an issue we therefore leave for another day.

sources, is sufficient in itself to support an action for damages to those resources. *See, e.g., Maryland* v. *Amerada Hess Corp.*, 350 F. Supp. 1060, 1066-67 (D. Md. 1972). Defendants reply that, absent a proprietary interest in the resource actually damaged, a state's unexercised regulatory authority over wildlife will not support a proper cause of action. *See, e.g., Commonwealth* v. *Agway, Inc.*, 210 Pa. Super. 150, 232 A.2d 69 (1967)). We see not need to decide this difficult question in the present case. Here the Commonwealth of Puerto Rico, exercising its undisputed authority to protect and conserve its natural environment, has by statute authorized one of its agencies to maintain actions of this sort. Under the statute, 12 L.P.R.A. § 1131 (29), co-plaintiff Environmental Quality Board has, among others, the following duties, powers and functions:

> "(29) To bring, represented by the Secretary of Justice, by the Board's attorneys, or by a private attorney contracted for such purpose, civil actions for damages in any court of Puerto Rico or the United States of America to recover the total value of the damages caused to the environment and/or natural resources upon committing any violation of this chapter and its regulations. The amount of any judgment collected to such effect shall be covered into the Special Account of the Board on Environmental Quality."

We read this statute both as creating a cause of action of the type described by its terms and as designating the EQB as the proper party to bring such an action. We see nothing in *Hughes* v. *Oklahoma* or in the federal Constitution to prohibit such legislation. Whatever might be the case in the absence of such a local statute, we think that where the Commonwealth of Puerto Rico has thus legislatively authorized the bringing of suits for environmental damages, and has earmarked funds so recovered to a special

fund, such an action must be construed as taking the place of any implied common law action the Commonwealth, as trustee, might have brought. Any other construction would invite the risk of double recovery and lead to confusion as to the rights of the two state plaintiffs in their identical or nearly identical actions. It is unnecessary, therefore, for us to consider whether, had the legislature of Puerto Rico not delegated to the EQB the right to maintain such suits, the Commonwealth would have an inherent right to bring them itself.

Defendants assert, as a sort of last ditch rebuttal to this line of argument, that the present action is not authorized under section 1131 (29), because plaintiff EQB failed to allege in the complaint "any violation of this chapter and its regulations." This assertion is erroneous. In the third amended complaint, plaintiff specifically alleged a violation of 24 L.P.R.A. § 595, which provides:

> "It shall be unlawful for any person, directly or indirectly, to throw, discharge, pour or dump, or permit to be thrown, discharged, poured or dumped into the waters, any organic or inorganic matter capable of polluting or of leading to the pollution of said waters in such manner as to place them out of the minimum standards of purity that the Secretary of Health may establish under section 599 of this title."

This statute is explicitly made a part of Title 12, chapter 121 by 12 L.P.R.A. § 1132 (b). The "minimum standards of purity" referred to in section 595 have been promulgated, and they make clear that any unauthorized discharge of petroleum into the waters—including the territorial waters —of Puerto Rico is considered unlawful. *See* P.R. Rules & Regulations, Title 24, § 598-5. Defendants' challenge to the right of the EQB to maintain this action is thus without merit.

Equally unavailing would be any argument that this state statutory action is not cognizable in admiralty. An oil spill on the navigable waters is a breach of federal maritime law. *Maryland* v. *Amerada Hess Corp.*, 350 F. Supp. 1060, 1065 (D. Md. 1972); *American Waterways Operators, Inc.* v. *Askew*, 335 F. Supp. 1241, 1247 (M.D. Fla. 1971) (three-judge court), *rev'd on other grounds*, 411 U.S. 325 (1973); *California* v. *S.S. Bournemouth*, 307 F. Supp. 922, 926 (D. Cal. 1969). Where the injury occurs in the territorial waters of a state, the general rule is that admiralty will give "broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction." *Just* v. *Chambers*, 312 U.S. 383, 391 (1941). *See also Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 373-74 (1959). Defendants do not argue, nor could they, that this action runs counter to the essential features of federal jurisdiction. *See Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

B.

Defendants next argue the district court erred in failing to apply the common law "diminution in value" rule in calculating damages. Under the traditional rule, the measure of damages for tortius injury to real property is the difference in the commercial or market value of the property before and after the event causing injury. *See* Restatement (Second) of Torts § 929 (1) (a) (1979). Where the property can be restored to its original condition for a sum less than the diminution in value, however, the cost of restoration may be substituted as a measure of damages. *See, e.g., Big Rock Mountain Corp.* v. *Stearns-Roger Corp.*, 388 F.2d 165, 168-69 (8th Cir. 1968). Defendants introduced evidence at trial tending to show that the market value of

comparable property in the vicinity of Bahia Sucia was less than $5,000 per acre, based on recent sales. Thus, defendants contend, damages here could not have exceeded $5,000 per affected acre even if the land were shown to have lost all value.

We believe that defendants have misconceived the character of the remedy created by section 1131. The EQB is not concerned with any loss in the market or other commercial value of the Commonwealth's land. In point of fact, the EQB concedes the land has no significant commercial or market value. The claim, rather, is for the injury—broadly conceived—that has been caused to the natural environment by the spilled oil. The question before us is not whether in a typical land damage case a claim of this sort could be successfully advanced—we assume it could not—but rather whether Puerto Rico's statute empowering the EQB to proceed in cases such as this envisions the awarding of damages on a different basis than would have been traditionally allowed.

The district court found that the once flourishing natural environment of the West Mangrove had been seriously damaged by the oil, to the point where some of the underlying sediments were no longer capable of supporting any but the most primitive forms of organic life, such as worms. The Puerto Rico statute authorizing this action specifically empowers the EQB to recover "the *total value* of the damages caused to the environment and/or natural resources" upon a violation of the anti-pollution provisions. 12 L.P.R.A. § 1131 (29) (emphasis added). Implicit in this choice of language, we think, is a determination not to restrict the state to ordinary market damages. Many unspoiled natural areas of considerable ecological value have little or no commercial or market value. Indeed, to the extent such areas have a commercial value, it is logical to assume they will not long remain unspoiled, absent some governmental or philanthropic protection. A strict appli-

Similarly, in the Outer Continental Shelf Lands Act Amendments of 1978, Congress provided that the government could recover damages for economic loss arising out of an oil spill, including "injury to, or destruction of, natural resources," 43 U.S.C. § 1813 (a) (2) (C), and "loss of use of natural resources," *id.* § 1813 (a) (2) (D). The Submerged Lands Act, which forms the basis for the Outer Continental Shelf Lands Act, *see* 43 U.S.C. § 1811 (9), defines "natural resources" as including, "without limiting the generality thereof, oil, gas, and other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life." 43 U.S.C. § 1301 (e). While the latter acts do not, by their terms, apply to Puerto Rico, *see* 43 U.S.C. § 1301 (g), like the Clean Water Act they do give some indication that Congress has determined that it is desirable to provide for environmental damages apart from the commercial loss, ordinarily measured by a market value yardstick, suffered by landowners and/or exploiters of natural resources. This perception is reinforced by the section of the OCS Lands Act which provides that sums the state recovers "shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of . . . the State, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources." 43 U.S.C. § 1813 (b) (3).

Especially in light of this recent federal statutory activity, we think that limitation of recovery to those damages recoverable under the common law "diminution in value" rule would be inconsistent with the manifest intent of Puerto Rico's environmental statute. In enacting section 1131, Puerto Rico obviously meant to sanction the difficult, but perhaps not impossible, task of putting a price tag on resources whose value cannot always be measured by the rules of the marketplace. Although the diminution rule is

defendants' pleadings, nothing more favorable to defendants could have been found than was found on the issue of liability, and we do not think the record displays a judicial attitude that was "poisoned" against the defendants with respect to the issues that remained.[17]

IV.

The West of England defendants, insurers of the ZOE COLOCOTRONI, argue the district court erred in asserting personal jurisdiction over them. The insurers maintain they are outside the reach of the District Court for the District of Puerto Rico because they have no office, sell no insurance, and purportedly transact no business in Puerto Rico. To sustain in personam jurisdiction over a foreign corporation, the court must find both that personal jurisdiction is authorized by the local statute and that the exercise of such jurisdiction does not violate the due process

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17. Defendants challenge one further aspect of the district court's findings. Based on the depositions and other exhibits of the crew and master, the court found that the owners knowingly and negligently permitted the ZOE COLOCOTRONI to depart Venezuela in an unseaworthy condition. In their brief, defendants assert that the standard marine insurance contract exempts the insurer from the duty to cover losses engendered by the owners' knowing use of an unseaworthy vessel. Defendants apparently have reference to Rule 30 (b) (ii) of the "Rules and List of Correspondents" of West of England, which provides:

> "Notwithstanding anything contained in Rule 15 or any other agreement between the Association and an insured Owner the insurance afforded by the Association shall not extend to liabilities, costs or expenses *attributable to the willful misconduct* of the insured Owner or his Managers." (Emphasis added.)

The insurers' argument is that it is inconsistent to hold them liable in light of the district court's findings as to the owners' degree of fault.

For purposes of this litigation, which involved no cross-claims between the insurers and the owners, it is enough to say that all the defendants' pleadings on liability were stricken—including the insurers' defenses based on the terms and conditions of the insurance contract. As we have herein upheld the striking of the pleadings, defendant insurers were properly barred from raising this defense against plaintiffs.

requirement that the nonresident defendant will have certain "minimum contacts" with the forum state. *See World-Wide Volkswagen Corp.* v. *Woodson,* 48 U.S.L.W. 4079, 4081 (1980); *International Shoe Co.* v. *Washington,* 326 U.S. 310, 316 (1945). These contacts must be such that the assertion of jurisdiction comports with "traditional notions of fair play and substantial justice.'" *Id., quoting Milliken* v. *Meyer,* 311 U.S. 457, 463 (1940).

Plaintiffs advanced two theories in the district court to justify in personam jurisdiction over West of England. First, plaintiffs argued that documents obtained from West of England's local law firm—Hartzell, Ydrach, Mellado, Santiago, Perez & Novas of San Juan, Puerto Rico (hereinafter Hartzell)—demonstrated that the Hartzell firm was actually West of England's "managing or general agent" in Puerto Rico, such that the firm was impliedly authorized to accept service of process on West of England's behalf. *See* Fed. R. Civ. P. 4 (d) (3); 2 Moore's Federal Practice ¶¶ 4.12, 4.22 [1]. These documents consisted primarily of files of matters handled for defendants by Hartzell, pamphlets listing Hartzell as "correspondent" for defendants, and instructions issued to Hartzell on its duties as a correspondent. The files showed that Hartzell had, among other things, arranged on behalf of West of England and various insured owners for the burial of a deceased Egyptian sailor with appropriate religious observances, for the repatriation by air of several other sailors, and for numerous surveys and other investigations in connection with possible claims for damage or injury. The district court ruled, however, that these activities by Hartzell were so "substantially intertwined with Hartzell's primary professional functions" as defendants' retained law firm that it could not hold Hartzell to be a "managing or general agent" for purposes of accepting service of process on Hartzell's client.

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provides that, constitutional limitations aside, personal jurisdiction may be asserted over a nonresident defendant in the district court to the extent permitted by the long-arm statute of the state in which the court is sitting. *See* 2 Moore's Federal Practice ¶ 4.01 [1]. Puerto Rico's long-arm statute is expressed in Rule 4.7 of the Puerto Rico Rules of Civil Procedure which provides, in pertinent part,

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A.

We turn first to the issue of plaintiffs' right to bring this lawsuit. The district court held that the Commonwealth had "standing" to recover for damages to natural resources, namely the mangrove trees and the various species of marine creatures living in and around them, on the theory that the Commonwealth was the "trustee of the public trust in these resources" and had an interest in them

18. The result we reach is further buttressed by the Supreme Court's occasional suggestions that the test for measuring minimum contracts for insurance companies may be somewhat less stringent than for other nonresident corporations because of the forum state's public policy interest in promoting effective redress for injuries. *See McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957); *cf. Hanson* v. *Denckla*, 357 U.S. 235, 252 (1958). Here the maritime accident resulted in injury to Puerto Rico's coastal environment, and plaintiffs represented this forum-related interest.

as *parens patriae.* 456 F. Supp. at 1337; *see Maryland* v. *Amerada Hess Corp.,* 350 F. Supp. 1060 (D. Md. 1972); *Maine* v. *M/V Tamano,* 357 F. Supp. 1097 (D. Me. 1973); *In re Steuart Transportation Co.,* No. 76-697-N (E.D. Va. 1980). The court also ruled that the Environmental Quality Board had standing to proceed as co-plaintiff seeking similar relief under a state statute authorizing the EQB to bring damages actions for environmental injuries. 456 F. Supp. at 1337; 12 L.P.R.A. § 1131 (29).

While the parties and the district court speak in terms of "standing," we think the question is more properly whether plaintiffs have stated a cognizable cause of action.[19] Defendants concede that Puerto Rico, as owner of the real property primarily affected by the oil spill, *see* 48 U.S.C. § 749, would, like any private landowner, have a cause of action in admiralty to recover whatever damages it could prove under conventional principles for its private economic loss as measured by diminution of market value in the coastal land. *See* 46 U.S.C. § 740. The Commonwealth made no attempt to show such damages, however. It seeks relief instead under an asserted right to recover as a governmental entity on behalf of its people for the loss of living natural resources on the land such as trees and animals.[20]

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19. Plaintiffs' Article III standing is not challenged here, since, assuming plaintiffs have a valid cause of action, they clearly are the proper parties to raise it. *See Davis* v. *Passman,* 442 U.S. 228, 239 & n.18 (1979).

20. We note at this point several questions which are not presented in this case, and on which we express no opinion. First, since the lands in question were all owned by Puerto Rico, we need not decide whether or in what circumstances a state might have a cause of action for environmental harm to privately owned land. Second, since the living natural resources in issue here were all attached more or less permanently to the land, we also do not decide whether any cause of action would accrue, and if so what remedies would be available, where more transitory forms of wildlife such as birds or fish were damaged. Third, this case does not present the issue of overlapping state and federal causes of action. While the Federal

Defendants contend that Puerto Rico's assertion of a recoverable interest in wildlife and other living natural resources is undercut by a line of Supreme Court cases culminating in *Hughes* v. *Oklahoma,* 441 U.S. 322 (1979). *See also Douglas* v. *Seacoast Products, Inc.,* 431 U.S. 265, 284 (1977); *Toomer* v. *Witsell,* 334 U.S. 385, 402 & n.37 (1948); *Missouri* v. *Holland,* 252 U.S. 416, 434 (1920); *cf. Geer* v. *Connecticut,* 161 U.S. 519 (1896). In *Hughes,* the Court formally overruled *Geer* v. *Connecticut,* invalidating on Commerce Clause grounds a state ban on interstate transportation of wildlife lawfully caught in the state and completing the long erosion of *Geer's* theory of state ownership of wildlife. The court recognized, however, that states retain an important interest in the regulation and conservation of wildlife and natural resources. "[T]he general rule we adopt in this case makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th Century legal fiction of state ownership." 441 U.S. at 335-36. Later the Court said, "We consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens." *Id.* at 337.

Plaintiffs argue that a state regulatory interest in wildlife and other living resources, expressed metaphorically in the state's status as "public trustee" of its natural re-

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Clean Water Act of 1977 specifically stated that it did not preempt the imposition by a state of "any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State," 33 U.S.C. § 1321 (o) (2), a problem of double recovery might be raised under some circumstances. Here, however, the United States made no claim for environmental damage (at the time this case arose there was no federal statute authorizing such an action) and asserted no legal interest in the affected lands. The interplay of the state cause of action asserted here with the federal remedial legislation discussed *infra* is an issue we therefore leave for another day.

sources, is sufficient in itself to support an action for damages to those resources. *See, e.g., Maryland* v. *Amerada Hess Corp.*, 350 F. Supp. 1060, 1066-67 (D. Md. 1972). Defendants reply that, absent a proprietary interest in the resource actually damaged, a state's unexercised regulatory authority over wildlife will not support a proper cause of action. *See, e.g., Commonwealth* v. *Agway, Inc.*, 210 Pa. Super. 150, 232 A.2d 69 (1967)). We see not need to decide this difficult question in the present case. Here the Commonwealth of Puerto Rico, exercising its undisputed authority to protect and conserve its natural environment, has by statute authorized one of its agencies to maintain actions of this sort. Under the statute, 12 L.P.R.A. § 1131 (29), co-plaintiff Environmental Quality Board has, among others, the following duties, powers and functions:

> "(29) To bring, represented by the Secretary of Justice, by the Board's attorneys, or by a private attorney contracted for such purpose, civil actions for damages in any court of Puerto Rico or the United States of America to recover the total value of the damages caused to the environment and/or natural resources upon committing any violation of this chapter and its regulations. The amount of any judgment collected to such effect shall be covered into the Special Account of the Board on Environmental Quality."

We read this statute both as creating a cause of action of the type described by its terms and as designating the EQB as the proper party to bring such an action. We see nothing in *Hughes* v. *Oklahoma* or in the federal Constitution to prohibit such legislation. Whatever might be the case in the absence of such a local statute, we think that where the Commonwealth of Puerto Rico has thus legislatively authorized the bringing of suits for environmental damages, and has earmarked funds so recovered to a special

fund, such an action must be construed as taking the place of any implied common law action the Commonwealth, as trustee, might have brought. Any other construction would invite the risk of double recovery and lead to confusion as to the rights of the two state plaintiffs in their identical or nearly identical actions. It is unnecessary, therefore, for us to consider whether, had the legislature of Puerto Rico not delegated to the EQB the right to maintain such suits, the Commonwealth would have an inherent right to bring them itself.

Defendants assert, as a sort of last ditch rebuttal to this line of argument, that the present action is not authorized under section 1131 (29), because plaintiff EQB failed to allege in the complaint "any violation of this chapter and its regulations." This assertion is erroneous. In the third amended complaint, plaintiff specifically alleged a violation of 24 L.P.R.A. § 595, which provides:

> "It shall be unlawful for any person, directly or indirectly, to throw, discharge, pour or dump, or permit to be thrown, discharged, poured or dumped into the waters, any organic or inorganic matter capable of polluting or of leading to the pollution of said waters in such manner as to place them out of the minimum standards of purity that the Secretary of Health may establish under section 599 of this title."

This statute is explicitly made a part of Title 12, chapter 121 by 12 L.P.R.A. § 1132 (b). The "minimum standards of purity" referred to in section 595 have been promulgated, and they make clear that any unauthorized discharge of petroleum into the waters—including the territorial waters —of Puerto Rico is considered unlawful. *See* P.R. Rules & Regulations, Title 24, § 598-5. Defendants' challenge to the right of the EQB to maintain this action is thus without merit.

Equally unavailing would be any argument that this state statutory action is not cognizable in admiralty. An oil spill on the navigable waters is a breach of federal maritime law. *Maryland* v. *Amerada Hess Corp.*, 350 F. Supp. 1060, 1065 (D. Md. 1972); *American Waterways Operators, Inc.* v. *Askew*, 335 F. Supp. 1241, 1247 (M.D. Fla. 1971) (three-judge court), *rev'd on other grounds*, 411 U.S. 325 (1973); *California* v. *S.S. Bournemouth*, 307 F. Supp. 922, 926 (D. Cal. 1969). Where the injury occurs in the territorial waters of a state, the general rule is that admiralty will give "broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction." *Just* v. *Chambers*, 312 U.S. 383, 391 (1941). *See also Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 373-74 (1959). Defendants do not argue, nor could they, that this action runs counter to the essential features of federal jurisdiction. *See Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

B.

Defendants next argue the district court erred in failing to apply the common law "diminution in value" rule in calculating damages. Under the traditional rule, the measure of damages for tortius injury to real property is the difference in the commercial or market value of the property before and after the event causing injury. *See* Restatement (Second) of Torts § 929 (1) (a) (1979). Where the property can be restored to its original condition for a sum less than the diminution in value, however, the cost of restoration may be substituted as a measure of damages. *See, e.g., Big Rock Mountain Corp.* v. *Stearns-Roger Corp.*, 388 F.2d 165, 168-69 (8th Cir. 1968). Defendants introduced evidence at trial tending to show that the market value of

comparable property in the vicinity of Bahia Sucia was less than $5,000 per acre, based on recent sales. Thus, defendants contend, damages here could not have exceeded $5,000 per affected acre even if the land were shown to have lost all value.

We believe that defendants have misconceived the character of the remedy created by section 1131. The EQB is not concerned with any loss in the market or other commercial value of the Commonwealth's land. In point of fact, the EQB concedes the land has no significant commercial or market value. The claim, rather, is for the injury—broadly conceived—that has been caused to the natural environment by the spilled oil. The question before us is not whether in a typical land damage case a claim of this sort could be successfully advanced—we assume it could not—but rather whether Puerto Rico's statute empowering the EQB to proceed in cases such as this envisions the awarding of damages on a different basis than would have been traditionally allowed.

The district court found that the once flourishing natural environment of the West Mangrove had been seriously damaged by the oil, to the point where some of the underlying sediments were no longer capable of supporting any but the most primitive forms of organic life, such as worms. The Puerto Rico statute authorizing this action specifically empowers the EQB to recover "the *total value* of the damages caused to the environment and/or natural resources" upon a violation of the anti-pollution provisions. 12 L.P.R.A. § 1131 (29) (emphasis added). Implicit in this choice of language, we think, is a determination not to restrict the state to ordinary market damages. Many unspoiled natural areas of considerable ecological value have little or no commercial or market value. Indeed, to the extent such areas have a commercial value, it is logical to assume they will not long remain unspoiled, absent some governmental or philanthropic protection. A strict appli-

cation of the diminution in value rule would deny the state any right to recover meaningful damages for harm to such areas, and would frustrate appropriate measures to restore or rehabilitate the environment.

This perception is confirmed by the course of recent federal legislation in the area of oil pollution. The Clean Water Act of 1972 provided that the United States could recover, up to certain pre-set limits, the costs it incurred in cleaning up after an oil spill, but made no explicit reference to environmental damages. Pub. L. No. 92-500, 92d Cong., 2d Sess. § 311, 86 Stat. 816 (1972), *codified at* 33 U.S.C. § 1321 (f) (1976). The Clean Water Act Amendments of 1977 significantly expanded the scope of a vessel owner's potential liability. In particular, the federal government and the states were authorized to recover "costs or expenses incurred . . . in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance." 33 U.S.C. § 1321 (f) (4). Recoverable removal costs were defined as including the expense "of such . . . actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches." *Id.* § 1321 (a) (8). The liability provision concluded:

> "The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal government, or the State government."

Id. § 1321 (f) (5).

Similarly, in the Outer Continental Shelf Lands Act Amendments of 1978, Congress provided that the government could recover damages for economic loss arising out of an oil spill, including "injury to, or destruction of, natural resources," 43 U.S.C. § 1813 (a) (2) (C), and "loss of use of natural resources," *id.* § 1813 (a) (2) (D). The Submerged Lands Act, which forms the basis for the Outer Continental Shelf Lands Act, *see* 43 U.S.C. § 1811 (9), defines "natural resources" as including, "without limiting the generality thereof, oil, gas, and other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life." 43 U.S.C. § 1301 (e). While the latter acts do not, by their terms, apply to Puerto Rico, *see* 43 U.S.C. § 1301 (g), like the Clean Water Act they do give some indication that Congress has determined that it is desirable to provide for environmental damages apart from the commercial loss, ordinarily measured by a market value yardstick, suffered by landowners and/or exploiters of natural resources. This perception is reinforced by the section of the OCS Lands Act which provides that sums the state recovers "shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of . . . the State, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources." 43 U.S.C. § 1813 (b) (3).

Especially in light of this recent federal statutory activity, we think that limitation of recovery to those damages recoverable under the common law "diminution in value" rule would be inconsistent with the manifest intent of Puerto Rico's environmental statute. In enacting section 1131, Puerto Rico obviously meant to sanction the difficult, but perhaps not impossible, task of putting a price tag on resources whose value cannot always be measured by the rules of the marketplace. Although the diminution rule is

appropriate in most contexts,[21] and may indeed be appropriate in certain cases under section 1131, *see infra,* it does not measure the loss which the statute seeks to redress in a context such as the present. No market exists in which Puerto Rico can readily replace what it has lost. The loss is not only to certain plant and animal life but, perhaps more importantly, to the capacity of the now polluted segments of the environment to regenerate and sustain such life for some time into the future. That the Commonwealth did not intend, and perhaps was unable, to exploit these life forms, and the coastal areas which supported them, for commercial purposes should not prevent a damages remedy in the face of the clearly stated legislative intent to compensate for "the total value of the damages caused to the environment and/or natural resources." 12 L.P.R.A. § 1131 (29). In recent times, mankind has become increasingly aware that the planet's resources are finite and that portions of the land and sea which at first glance seem useless, like salt marshes, barrier reefs, and other coastal areas, often contribute in subtle but critical ways to an environment capable of supporting both human life and the other forms of life on which we all depend. The Puerto Rico statute is obviously aimed at providing a damages remedy with sufficient scope to compensate for, and deter, the destruction of such resources; and while we can see many problems in fashioning such a remedy, we see no reason to try to frustrate that endeavor. We therefore do not limit damages herein to the loss of market value of the real estate affected.

21. The diminution rule has itself been limited in cases where the property has a special value to the injured party that is not reflected in its market value. *See, e.g., Rector, Wardens and Vestry of St. Christopher's Episcopal Church* v. *C.S. McCrossan, Inc.,* 306 Minn. 143, 235 N.W. 2d 609 (Minn. 1975) (and cases cited therein); Restatement (Second) of Torts § 929 (1) (a) and comment b (1979). The principles later discussed as being applicable in cases like this one, such as attempting to ascertain the reasonable cost of restoration, are thus not so completely removed from traditional valuation theory as might, at first blush, appear.

C.

We turn now to whether the damages awarded by the district court were appropriate. To review the court's award, we must ascertain what a fair and equitable damages measure would be in these circumstances, and, to that end, it will be helpful to examine the remedial provisions in recent similar federal statutes. There is a strong emphasis in Congressional oil pollution enactments on the concept of restoration. As discussed earlier, the 1977 Clean Water Act amendments provided that the state's representative, acting as public trustee, could "recover for the costs of replacing or restoring [natural] resources." 33 U.S.C. § 1321 (f) (5). In accordance with the trust analogy, the statute provided: "Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies. . . ." *Id.* The legislative history further elaborates this standard:

> "New subsections (f) (4) and (5) make governmental expenses in connection with damage to or destruction of natural resources a cost of removal which can be recovered from the owner or operator of the discharged source under section 311. For those resources which can be restored or rehabilitated, the measure of liability is the resonable costs actually incurred by Federal or State authorities in replacing the resources or otherwise mitigating the damage. Where the damaged or destroyed resource is irreplaceable (as an endangered species or an entire fishery), the measure of liability is the resonable cost of acquiring resources to offset the loss."

House Conf. Rpt. No. 95-830, 95th Cong., 1st Sess. 92, *reprinted in* [1977] U.S. Code Cong. & Ad. News 4424, 4467.

Borrowing from the suggestion provided by this federal legislation, we think the appropriate primary standard for

determining damages in a case such as this[22] is the cost reasonably to be incurred by the sovereign or its designated agency to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as is feasible without grossly disproportionate expenditures. The focus in determining such a remedy should be on the steps a reasonable and prudent sovereign or agency would take to mitigate the harm done by the pollution, with attention to such factors as technical feasibility, harmful side effects, compatibility with or duplication of such regeneration as is naturally to be expected, and the extent to which efforts beyond a certain point would become either redundant or disproportionately expensive. Admittedly, such a remedy cannot be calculated with the degree of certainty usually possible when the issue is, for example, damages on a commercial contract. On the other hand, a district court can surely calculate damages under the foregoing standard with as much or more certainty and accuracy as a jury determining damages for pain and suffering or mental anguish.

There may be circumstances where direct restoration of the affected area is either physically impossible or so disproportionately expensive that it would not be reasonable to undertake such a remedy.[23] Some other measure of dam-

22. *See* note 20 *supra*. As we stated earlier, our holding is limited to circumstances such as these where the sovereign seeking to recover has an ownership interest in the real property where the environmental damage occurred.

23. "The technology available to remove oil and to restock plant and animal communities is very limited at present, and development of such a technology would be a long-range undertaking. . . . In most instances, the recovery of an ecosystem after an oil spill would occur, if at all, only through the slow processes of natural regeneration."

Wood, *Requiring Polluters to Pay for Aquatic Natural Resources Destroyed by Oil Pollution*, 8 Nat. Res. Lawyer 545, 598 (1976). If natural regeneration is likely to occur within a reasonable period, it is conceivable in some cases that this will be enough. Whether to award damages based on the cost of hastening restoration by artificial means

ages might be reasonable in such cases, at least where the process of natural regeneration will be too slow to ensure restoration within a reasonable period. The legislative history of the Clean Water Act amendments, quoted above, suggests as one possibility "the reasonable cost of acquiring resources to offset the loss." *Id.* Alternatives might include acquisition of comparable lands for public parks or, as suggested by defendants below, reforestation of a similar proximate site where the presence of oil would not pose the same hazard to ultimate success. As with the remedy of restoration, the damages awarded for such alternative measures should be reasonable and not grossly disproportionate to the harm caused and the ecological values involved. The ultimate purpose of any such remedy should be to protect the public interest in a healthy, functioning environment, and not to provide a windfall to the public treasury.[24] In emphasizing the above measures, we do not

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will depend on a weighing of factors such as the feasibility and cost of the restoration plan, how long natural regeneration will take, how certain it is to occur, and how serious are the effects of a temporary absence of the damaged resources. There will doubtless be other factors we cannot now foresee.

24. Other reasonable and scientifically credible means of estimating damages in circumstances where complete restoration is not possible may exist. Defendants presented testimony by Dr. Roger Anderson, for example, suggesting that there is some scientific basis for the placing of a dollar value on commercially nonvaluable property such as marshland by estimating the contributions such land makes to other valuable activities like fisheries or recreation. Moreover, a bill currently pending in Congress—the so-called Superfund Bill—would, if enacted, expand the capacity of the federal and state governments to recover damages for natural resources injured by oil or other hazardous substances. Damages would not be limited to restoration and related replacement costs, but would also include a dollar value based on "assessment" of the damage to the environment. Such an assessment would in turn be based on methodologies to be developed through rulemaking by three federal agencies: the Environmental Protection Agency, the Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration. *See* S. 2083, 95th Cong., 2d Sess. § 5(e) (1978). For a more complete discussion of this proposed legislation, see DuBey & Fidell, *The Assessment of Pollution Damage to Aquatic Resources: Alternatives to the Trial Model,* 19

mean to rule out others in appropriate circumstances. There may indeed be cases where traditional commercial valuation rules will afford the best yardstick, as where there is a market in which the damaged resource could have been sold that reflects its actual value. Much must necessarily be left to the discretion of courts, especially before a body of precedent has arisen.

But while the district court's discretion is extensive, we are unable to agree with the approach taken by the court here in placing a value on the damaged resources. Plaintiffs presented two principal theories of damages to the court. The first theory was somewhat analogous to the primary standard we have enunciated above, focusing on plaintiffs' plan to remove the damaged mangrove trees and oil-impregnated sediments from a large area and replace them with clean sediment and container-grown mangrove plants. This plan was estimated to cost approximately $7 million. The district court sensibly and correctly rejected this plan as impractical, inordinately expensive, and unjustifiably dangerous to the healthy mangroves and marine animals still present in the area to be restored. We can find no fault with the district court's conclusion that this draconian plan was not a step that a reasonable trustee of the natural environment would be expected to take as a means of protecting the corpus of the trust.

Plaintiffs' second theory, which the court accepted, focused on the supposed replacement value of the living creatures— the epibenthic and infaunal animals—alleged to have been permanently destroyed or damaged by the oil spill. Plaintiffs repeatedly disavowed any connection between this theory and an actual restoration plan. In other

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Santa Clara L. Rev. 641, 674-80 (1979). Since many of these methodologies are in their infancy, *see* Note, *Assessment of Civil Monetary Penalties for Water Pollution: A Proposal for Shifting the Burden of Proof Regarding Damages,* 30 Hastings L.J. 651, 674-79 (1979), we wish neither to endorse nor rule out altogether their use in appropriate cases.

words, plaintiffs did not represent that they proposed to purchase 92 million invertebrate animals for actual introduction into the sediments, (which, being contaminated with oil, would hardly support them), but rather wished to use the alleged replacement value of these animals as a yardstick for estimating the quantum of harm caused to the Commonwealth. This theory has no apparent analog in the standards for measuring environmental damages we have discussed above. To be sure, the federal statutes from which we have borrowed speak in places of replacement as a part of the appropriate recovery. *See, e.g.*, 33 U.S.C. § 1321 (f) (5). But we believe these references, in context, should be interpreted as meaning replacement as a component in a practicable plan for actual restoration. Thus, for example, if a state were seeking to restore a damaged area of forest, a portion of the damages sought might be allocated to replacement of wild birds or game animals or such other creatures as would not be expected to regenerate naturally within a relatively finite period of time even with appropriate restoration. This is a far different matter from permitting the state to recover money damages for the loss of small, commercially valueless creatures which assertedly would perish if returned to the oil-soaked sands, yet probably would replenish themselves naturally if and when restoration—either artificial or natural—took place.

The case primarily relied upon by the district court to support its grant of damages for replacement value is not to the contrary. In *Feather River Lumber Co.* v. *United States*, 30 F.2d 642 (9th Cir. 1929), the United States brought an action seeking damages for a public forest allegedly destroyed when defendant negligently started a forest fire and permitted it to spread onto public land. The government's chief witness, a Forestry Service official, stated that he calculated the extent of the fire damage by counting the damaged and undamaged trees on one-tenth acre sample plots located at intervals throughout the 4,000

acre area. The official separated his estimates into two categories, merchantable timber, as to which there was a present market value based on local stumpage prices, and young timber, as to which there was only the possibility of future market value. The Ninth Circuit held that this method was proper as a means of estimating the extent of damage and that, as to the merchantable timber, "the measure of damages was the [market] value of the trees." *Id.* at 644. The court also held,

> "As to the young growth, while the measure of damages in such a case is ordinarily the difference in the value of the land before and after the fire, here, there being no law to authorize the sale of the lands injured by the fire, the trial court admitted such evidence as was available to show the damage actually sustained, that is to say, what was required to make a government whole, and this, we think, might properly include the cost of restoring the land to the condition in which it was before the fire."

Id. We think the quoted passage makes clear that the Ninth Circuit did not contemplate a purely abstract recovery such as that proposed here, where the theoretical "loss" was worked out in terms of what it would cost to buy thousands of creatures which, as a practical matter, would never be bought in such a manner and could not be expected to survive if returned to their damaged habitat. Rather, the Ninth Circuit was simply willing to permit the government to recover its actual and reasonable expected restoration costs based on the cost of replanting, a perfectly feasible and reasonable course of action in that case. Thus, leaving aside the question whether plaintiffs' evidence was sufficient to establish that 92 million creatures were destroyed and that six cents represented an appropriate replacement cost estimate, we are unable to endorse the theory of damages in support of which this evidence was advanced. We

thus hold that it was error to award $5,526,583.20 for the replacement value of the destroyed organisms.[25]

D.

We come finally to the disposition of this case. Defendants argue that, having rejected plaintiffs' damages theories, we should reverse the district court's judgment, except as to the Commonwealth's undisputed cleanup costs. While this is superficially an attractive course, we do not think the matter is quite so simple. To say that the law on this question is unsettled is vastly to understate the situation. The parties in this lawsuit, and we ourselves, have ventured far into uncharted waters. We do not think plaintiffs could reasonably have been expected to anticipate where this journey would take us. Though we have affirmed the district court's rejection of the Commonwealth's original, rather grandiose restoration plan, we believe the EQB should still have an opportunity to show, if it can, that some lesser steps are feasible that would have a beneficial effect on the West Mangrove ecosystem without excessive destruction of existing natural resources or disproportion-

25. Plaintiffs also offered a third claim for damages, which the district court accepted. This claim involved the estimate of $559,500 as the cost of replanting 23 acres with container-grown mangrove trees. Within the context of the evidence presented, and the other rulings made by the district court, we are unable to understand its acceptance of this component of the damages. First, plaintiffs' experts clearly testified that the 23 acres included mangroves in both East Mangrove and West Mangrove, with the larger area being in the east. *See, e.g.*, note 9 *supra*. In light of the district court's finding that there was no significant damage in East Mangrove, it is not clear why replanting of mangroves on that site was necessary at all. Furthermore, plaintiffs' experts also testified that the mangrove trees in the West Mangrove were dead or dying because of the presence of oil in the sediments. Replanting new trees in this same oil-soaked environment seems pointless if no attempt is to be made to counteract the effects of the oil. As we are remanding the case in any event, we think this award should be vacated pending a redetermination of the extent of the damage in West Mangrove and a further submission by plaintiffs integrating this proposal into a more reasonable plan, or set of alternative plans, for restoring the area.

ate cost. The cost projected for the carrying out of such reasonable lesser steps would be an appropriate award of damages to the EQB. Plaintiffs may wish, at the same time, to reopen the question of alternative-site restoration, as to which the district court initially declined to take evidence, although we hasten to add that we do not now rule on whether the concept of alternative site restoration would make sense in this case as a measure of damages. We therefore remand the case to the district court with instructions to reopen the record for further evidence on the issue of damages in line with our discussion of the principles governing recovery in cases of this sort.

Defendants cannot successfully claim that this disposition will prejudice their rights appreciably. Defendants themselves introduced evidence at the first trial on damages seeking to establish that restoration projects less extensive and less costly than plaintiffs' were possible. Had the district court accepted these proposals in lieu of plaintiffs', defendants would have had a potential liability of up to $1 million. We do not mean to suggest that plaintiffs are necessarily entitled to recover this, or any other, specific amount. Nor do we put any limits on defendants' right to contest any proposals put forward by plaintiffs, or to offer counterproposals. In essence, while the court and the parties are entitled to rely on the record already developed to the extent they wish to do so, we think the record should be reopened on the issue of damages, with a renewed evidentiary hearing to be conducted in light of the standards for measuring such damages we have announced today. While we regret the necessity this will entail for further delay in this already protracted litigation, we trust that the district court, with the good faith assistance of the parties, will be able to carry out further proceedings without unreasonable delay.

To avoid any question that might be raised, *see O'Shea* v. *United States*, 491 F.2d 774, 778-80 (1st Cir. 1974), we note that we can see no reason why this case should not go back to the same district judge, who already possesses considerable familiarity with it.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 78-1543

COMMONWEALTH OF PUERTO RICO, *et al.*,
Plaintiffs, Appellees,

v.

THE SS ZOE COLOCOTRONI,
HER ENGINES, APPURTENANCES,
etc., *et al.*,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

SUBMITTED: June 8, 1979
FILED: July 10, 1979

Before COFFIN, *Chief Judge.*
CAMPBELL and BOWNES, *Circuit Judges.*

CAMPBELL, *Circuit Judge.* At issue is the proper procedure to be followed in filing a motion for relief from judgment, Fed. R. Civ. P. 60(b), while an appeal from the same judgment is already pending in this court.

Defendant-appellants have filed a timely appeal from a final judgment which holds them liable for more than six

million dollars in damages due to environmental harm caused by an oil spill from the tanker The SS Zoe Colocotroni. We have granted them several extensions of time within which to file their brief and appendix on the basis of their allegations that new counsel on appeal needed time to familiarize themselves with the huge record, that compilation and transfer of the record took longer than usual, and that preparation of the appendix was delayed due to the parties' dispute about what documents it should contain.

Appellants advised this court in their motions for extensions that they were preparing a motion to vacate judgment; and on the latest due date for their appellate brief and appendix, they filed instead of those documents, a motion for a further enlargement and a motion for our leave to file a motion under Rules 60(b) and 1, Fed. R. Civ. P., in the district court. In their motion for leave appellants claimed they were uncertain as to whether, during the pendency of this appeal, the district court could act without such leave on their motion for relief from judgment. Both the motion for leave and the motion for enlargement of time were opposed on the grounds that the motion for relief from judgment was frivolous and made solely for purposes of delay.

By order entered June 11, 1979, we denied appellants' motion for leave, without prejudice. We indicated in our order that parties situated as are appellants would not be required to obtain leave from this court prior to filing a motion for relief from judgment in the district court. We also indicated that the present opinion, explaining the basis of our decision, would follow.

We have not previously addressed this matter except to state that a district court lacks jurisdiction to *grant* a motion to vacate while an appeal is pending. *Krock* v. *Electric Motor & Repair Co.*, 339 F.2d 73, 74 n.1 (1st Cir.), *cert. denied*, 377 U.S. 934 (1964).[1] Other circuits have spoken, but

1. As will be seen, we adhere to that holding insofar as it pertains to the *granting* of 60(b) motions.

not with uniformity. Some adhere to the position that once a notice of appeal is filed, a district court is divested of jurisdiction to act on a Rule 60(b) motion. *Norman* v. *Young*, 422 F.2d 470, 474 (10th Cir. 1970), (*but see Aune* v. *Reynders*, 344 F.2d 835, 841 (10th Cir. 1965); *Weiss* v. *Hunna*, 312 F.2d 711, 713-14 (2d Cir.), *cert. denied*, 374 U.S. 853 (1963); *reaffirmed in Diapulse Corp. of America* v. *Curtis Publishing Co.*, 374 F.2d 442, 447 (2d Cir. 1967). These courts require the obtaining of an order of remand from the court of appeals before a party desiring relief from judgment may file a Rule 60(b) motion in the district court. The appellate court bases its decision whether to remand upon its view of the substantiality of the motion to vacate. If it finds the motion to vacate lacking in substance, it will refuse to remand, and the unsuccessful party must wait until mandate issues before he may file a 60(b) motion in district court.

Other circuits do not require parties to obtain circuit court leave prior to moving in district court to vacate a judgment from which an appeal is pending. The motion may be both filed and considered in the district court without leave from the court of appeals. Furthermore, the district court may, on its own, proceed to deny the 60(b) motion without permission of the court of appeals. Only if the district court is inclined to grant the motion need a remand be sought and obtained; until a remand is obtained, the district court may not actually grant 60(b) relief. *Pioneer Insurance Co.* v. *Gelt*, 558 F.2d 1303, 1312 (8th Cir. 1977); *Lairsey* v. *Advance Abrasives Co.*, 542 F.2d 928, 930-32 (5th Cir. 1976); *First National Bank of Salem, Ohio* v. *Hirsch*, 535 F.2d 343, 345-46 (6th Cir. 1976); *Washington* v. *Board of Education, School District 89, Cook County, Illinois*, 498 F.2d 11, 16 (7th Cir. 1974); *Salisbury* v. *United States*, 356 F.2d 822, 824 (D.C. Cir. 1966); *Aune* v. *Reynders*, 344 F.2d 835, 841 (10th Cir. 1965) (*contra. Norman, supra*, 422 F.2d 470). The district court's authority

to consider and deny the motion without obtaining leave from the circuit court is based on the district court's continuing jurisdiction during an appeal to act in aid of the appeal. *Lairsey,* 542 F.2d at 930; *Hirsch,* 535 F.2d at 345 n.1. Adherence to this procedure appears to be the trend. 11 Wright & Miller. *Federal Practice & Procedure,* § 2873 at 263-66 (1973).

We join with the latter mentioned circuits which do not require Rule 60(b) motions to be screened at the circuit level prior to their being filed in district court. We see several advantages to that approach. The district court, being familiar with the case, is in a far better position than is an appellate court to evaluate the motion's merits quickly. If the motion is frivolous, the district court will recognize this faster than we, and if it is not frivolous, there is no need for us to discover that fact first. Our tentative screening decision would be neither binding on the district court, to whom, after all, the motion is addressed, nor particularly instructive to it.[2]

It is true that initial circuit court screening might in some cases deter the utilization of Rule 60(b) motions as a means for appellate delay. A party might file such a motion hoping that a district court would not act promptly upon it, and that the circuit court would meanwhile entertain requests to hold the appeal in limbo while awaiting district court disposition. Such ploys can, however, be deterred

2. Support for our decision to follow the "trend" can also be derived by analogy to the rule which allows 60(b) motions to be filed in the district court without leave from an appellate court that earlier affirmed the decision below. *Standard Oil Co.* v. *United States,* 429 U.S. 17 (1976). The Supreme Court reasoned that a proper 60(b) motion raises new matters not included or includable in the first appeal and the mandate of an affirming court is not a bar to considering properly presented new matters affecting the judgment. Our contrary holding in *Wilson Research Corp.* v. *Piolite Plastics Corp.,* 336 F.2d 303 (1st Cir. 1964), was overruled by *Standard Oil* and therefore does not affect our consideration of either the issue at bar or the question of 60(b) motions filed after issuance of appellate mandate.

otherwise than by required appellate screening of all such motions, a process which itself might engender delay. District courts, especially when the pendency of an appeal is brought to their attention, can be expected to act promptly on most 60(b) motions, particularly frivolous motions or those which raise issues the court has already considered. Appropriate sanctions can be imposed on parties whose motions serve no purpose except for delay. In our view, any benefits to be gained from pro forma appellate court screening are outweighed by the burdens.

Our rule is thus as follows: when an appeal is pending from a final judgment, parties may file Rule 60(b) motions directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit, bearing in mind that any delay in ruling could delay the pending appeal.[3] If the district court is inclined to grant the motion, it should issue a brief memorandum so indicating. Armed with this, movant may then request this court to remand the action so that the district court can vacate judgment and proceed with the action accordingly.

If appellate court due dates (*e.g.*, for briefs) are nearing when the Rule 60(b) motion is filed in district court, movant may request this court, in its discretion, for a brief postponement of specific duration to allow the district court time to screen and, if warranted, deny the motion. Such

3. If the district court is unable conscientiously to dispose of the motion within a few days of its filing, because it requires further argument, briefing, or the like, it should issue a brief memorandum to this effect. The memorandum should indicate that the motion is non-frivolous and not capable of being fairly decided solely on the basis of the court's initial screening and that the court will require a specified number of more days to complete its review and issue an order. If the district court needs portions of the record to review the motion adequately which, because of the pending appeal, are here, it may request those portions in the same memorandum. This memorandum will enable us to act intelligently on extension requests made in the appeal.

requests must be accompanied by proof of the date on which the motion was filed in district court. The granting of any extension of time limits beyond the very limited one just mentioned will be contingent upon our being presented with a copy of a district court memorandum which states that the district court is inclined to grant the motion or else thinks the motion is non-frivolous and not capable of being fairly decided solely on the basis of the court's initial screening. *See* footnote 3, *supra.*

If the motion for relief from judgment is denied by the district court, and the denial appealed, we will entertain a request to consolidate that appeal with the pending appeal from final judgment where feasible.

We will also entertain requests for sanctions to be imposed upon the party who filed the motion to vacate if we find on appeal from the motion's denial that the motion was frivolous.

We have already entered an order consistent with the foregoing in the case at bar.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1543

COMMONWEALTH OF PUERTO RICO, *et al.*,
Plaintiffs, Appellees,

v.

THE SS ZOE COLOCOTRONI,
HEF. ENGINES, APPURTENANCES,
etc., *et al.*,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Submitted: June 8, 1979
Filed: June 11, 1979

MEMORANDUM AND ORDER

Appellants' motion for leave and amendment thereto are denied without prejudice, as we shall not require parties situated as are appellants to obtain leave from this court prior to filing a motion for relief under Rules 60(b) and 1 in the district court. Our opinion to this effect, explaining our policy and the procedures to be followed in this circuit in moving to vacate judgment while an appeal is pending, will shortly be issued in this case.

Appellants should file their motion under Rules 60(b) and 1 in the district court immediately. The court is directed to review the motion expeditiously and to issue an order by July 2, 1979 either (1) denying the motion, (2) indicating that it is inclined to grant the motion, or (3) indicating that in its view the motion is nonfrivolous and that its needs additional time to rule on the issues presented. In the latter event, if the court needs portions of the record in order to conduct further review, it may in the same order request that these portions be returned for that purpose.

Appellants' brief and appendix are due thirty days (a) from July 2, 1979 (*i.e.* by August 1, 1979) or (b) from the date the district court denies their motion for relief from judgment, whichever date is earlier. If the district court issues an order on or before July 2 indicating that it is inclined to grant the motion or that, because the motion is nonfrivolous, it needs additional time for review, appellants may file a motion with this court for a further enlargement of time to file their brief and appendix. The motion should be accompanied by a copy of the district court's order.

If appellants' motion for relief from judgment is denied, and the denial appealed, should we find that the motion was frivolous we will entertain a request from appellees that appropriate sanctions be imposed upon appellants.

By the Court:
/s/ Dana H. Gallup
Clerk.

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civ. 252-73 and Civ. 309-73

COMMONWEALTH OF PUERTO RICO AND THE ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO,
Plaintiffs,

v.

THE SS ZOE COLOCOTRONI, HER ENGINES, APPURTENANCES, ETC., *et al.*,
Defendants.

UNITED STATES OF AMERICA

v.

M/V ZOE COLOCOTRONI, ETC., *et al.*,
Defendants.

DECISION

The present cases are the remnants of multiple suits[1] arising from the spillage of petroleum products by the SS

1. All suits were consolidated early in the proceedings. Civil Number 985-73, which involved a suit by a hotel for riparian damages and loss of business; Civil Number 268-73, a claim by the owners of the discharged petroleum to recover damages for its loss; and Civil Number 303-74, an action by various fishermen for property damage and loss of income, and by abutting salt pond owners for loss of income, were all settled prior to trial. Civil Number 289-73, a limitation and exoneration petition by the ship owner, was stricken for reasons indicated hereinafter.

ZOE COLOCOTRONI in the Caribbean Sea in the immediate vicinity of the Southwestern coast of Puerto Rico on March 18, 1973.

Civil Number 252-73 is a suit in admiralty, *in rem* and *in personam,* brought by the Commonwealth of Puerto Rico and its principal environmental agency, the Environmental Quality Board of the Commonwealth of Puerto Rico,[2] seeking recovery for various environmental damages and clean-up costs pursuant to the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), the Water Pollution Control Act of Puerto Rico (24 L.P.R.A. 59, et seq.) and the Public Policy Environmental Act of Puerto Rico (12 L.P.R.A. 1121, et seq.). The Defendants in this suit are the SS ZOE COLOCOTRONI,[3] her owners, Marbonanza Compañía Naviera, S.A. and/or Colocotroni Ltd. and/or Colocotroni Brothers, S.A.,[4] and their underwriters, West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg) and West of England Ship Owners Mutual Insurance Association (London) Limited.[5]

Defendants' conduct during the pretrial discovery stages of this case and its companion suits was at best deliberately obstructive, and most probably also contumacious. These tactics culminated in the striking of their pleadings and defenses, and the dismissal of the petition for exoneration and limitation of liability in Civil Number 289-73.[6] The trial of this case was therefore limited to the issue of damages and matters relevant thereto.

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2. Hereinafter referred to as the "Commonwealth" and "EQB" respectively.

3. Hereinafter referred to as the "COLOCOTRONI."

4. Hereinafter collectively referred to as the "owners", or as "Marbonanza" and "Colocotroni Brothers", respectively.

5. Hereinafter collectively referred to as "West of England", or as "West, London" and "West, Luxembourg", respectively.

6. See Minutes of hearing of October 20, 1977 and Opinion and Order entered on October 21, 1977.

Civil Number 309-73 is a claim by the United States of America against the COLOCOTRONI, her owners and West of England for cleanup costs resulting from the spillage, and for penalties pursuant to the Rivers and Harbors Act (33 U.S.C. 407, 411, 412). At the commencement of trial summary judgment was entered on behalf of the United States for the cleanup costs. Hence, the only remaining issue in this action is whether said party is entitled to interest, penalties and attorneys' fees.

BACKGROUND

The COLOCOTRONI is a motor tanker built in 1953. She is 605 feet, 2 inches, l.o.a., has a gross tonnage of 15,899 tons, and net tonnage of 9,654 tons. Her hold has 26 cargo tanks subdivided into 7 tanks forward, 12 tanks amidship and 7 tanks aft, where her machinery is also located.

Although her home port is Piraeus, Greece, her registered owner is Marbonanza, a corporation organized in the Republic of Panamá. The actual control over the vessel's management and operations was exercised by Colocotroni Brothers, two foreign corporations organized in Greece and Great Britain, respectively.[7] These companies had the joint responsibility for maintaining, provisioning, manning and insuring the COLOCOTRONI.[8] Colocotroni Brothers were Marbonanza's agents at all times pertinent herein.

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7. Pursuant to earlier rulings, this Court held that both the owners and West of England were foreign corporations doing business in Puerto Rico and thus amenable to in personam jurisdiction pursuant to Puerto Rico's "long arm" statute. See Rule 4.7 of P.R. Rules of Civ. P. (32 L.P.R.A. App. II) and our Order of January 14, 1977.

8. The degree of control exercised by Colocotroni Brothers over the day-to-day operations of the COLOCOTRONI was absolute. They followed the ship by radio communication wherever she went, and from copies of her log abstracts, it appears that they directed her operations in detail. The ship's captain only had authority to purchase fresh vegetables, fruits and fish not to exceed £100. Any excess had to be approved by Colocotroni Brothers. This was also the case for any repairs in excess of £50. The approval of the London office was required for all engine stores, paint, charts, rope, wire, tank cleaning, machines and hawsers, spare parts, spares for gyro and

On March 15, 1973 the COLOCOTRONI took on a load of 187,670 barrels of petroleum known as Tía Juana Crude, in La Salina, Venezuela. The crude was shipped by Mobil Oil Company de Venezuela and consigned to the Commonwealth Oil Refining Company in Guayanilla, Puerto Rico. On this same day the ship departed for Guayanilla.

At 0200 hours on March 16, she was 5.5 miles abeam of Aruba Light and assumed a course of 032°. She continued on this course, proceeding by celestial navigation until 1859 hours on March 17, when the last star fix was taken. This sight established her position as approximately 80 to 85 miles due south of Puerto Rico.

At 1859 the COLOCOTRONI altered course to 033° and proceeded at a speed of 10.4 knots. From this point on she navigated by dead reckoning, the officer on watch advancing the 1859 star fix in accordance with estimated speed, drift and heading.

At 0110 hours of March 18 the vessel's speed was reduced to 7½ to 8 miles per hour. The ship was about 18 to 20 miles from shore. The wind was proceeding from about 75° at 25 miles per hour. A two knot current was moving from east to west and there was no indication of inclement weather.

As he approached the coast, Captain Anastacios Michalopaulos, the ship's master, was not able to establish the position of the COLOCOTRONI. At 0253 he decided to backtrack and ordered left rudder. As the vessel turned westward, it ran out of water and went aground.

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compass, and bridge equipment. The office in Pireaus approved all provisions, bonded stores, deck stores, cabin stores, and spares for radio and the radar.

The corporate relationships between the various Defendants here are of more than passing interest. J. J. Colocotroni, who managed Colocotroni Brothers, S. A., in Piraeus, was also a director of Colocotroni Ltd. of London. E. M. J. Colocotroni was in turn the manager of Colocotroni Ltd. of London. Coincidentally he is one of the members of the Board of Directors of West of England, the insurers of the COLOCOTRONI and Marbonanza in a policy with a $15,000,000 limit covering casualties such as the one here in question.

The COLOCOTRONI grounded at 0300 hours of March 18, 1973 at latitude 17°55′ north, longitude 67°07′ west, which is approximately 3 miles due South of the village of La Parguera in Southwestern Puerto Rico. The water depth at that point ranges from 30.5 feet to 35 feet as compared to the COLOCOTRONI's draft at the time of grounding of 33 feet 4 inches. Seven-eighths of the ship's length grounded.

Captain Michalopaulos attempted to refloat the vessel by "rocking" it, that is, by alternately running the engines full forward and back. About ten minutes after the grounding, it became apparent that this maneuver was ineffective. Without seeking outside assistance, Captain Michalopaulos proceeded to lighten the ship by dumping 5,170.1 tons of crude oil, or an equivalent 1.5 million gallons, into the sea.[9] By 1212 hours of March 18, the COLOCOTRONI was afloat and free.

In the meantime the oil slick, about one-tenth of a mile wide by four miles long, b[illegible]an to extend westward from the place of grounding towards Cabo Rojo on the Southwestern tip of Puerto Rico. At some time during March 18, the oil hit Margarita Reef, which is located three and one half miles southeast of Bahía Sucia. The oil immersed Margarita Reef at low tide and thus, when the tide filled, Margarita Reef became a source of oil in addition to the oil afloat. Sometime after dark on March 18, the oil slick reached the shore of Bahía Sucia, the locale of the present controversy. At one point the oil slick extended along the entire distance from Margarita Reef to Bahía Sucia.

THE LIABILITY OF DEFENDANTS

The grounding, although accidental, was not surprising considering the state of the COLOCOTRONI and its crew.

9. Captain Michalopaulos was subsequently tried, found guilty and sentenced in the United States District Court for the District of Puerto Rico for violation of 33 U.S.C. 1321(b)5 and 1321(n). *United States* v. *Michalopaulos,* Cr. No. 61-73.

Although the immediate cause of the grounding was undoubtedly the fact that the ship's crew was hopelessly lost, the factors which directly contributed to this condition were the lack of proper charts on board,[10] the failure of the master to properly compensate for a westerly set in the current,[11] inoperative or defective navigation equipment,[12] the failure to post a bow lookout, and an incompetent crew.[13]

There is no doubt that at the time of grounding the COLOCOTRONI was in an unseaworthy condition, in that her charts, navigation equipment and crew were unfit to meet perils reasonably to be anticipated in her voyage. These were conditions which existed before the vessel left Venezuela and in fact for some time prior to departure. The COLOCOTRONI was thus unseaworthy at the commencement of the voyage in question and therefore her owners are not entitled to either exoneration nor, con-

10. The COLOCOTRONI was navigating with U.S. Naval Oceanographic Office Chart No. 25008 which is a large scale chart covering Hispaniola to St. Lucia and which fails to show details of the coast of Puerto Rico. The ship did not have on board U. S. Coast and Geodetic Survey Chart No. 901 which clearly depicts the place of grounding and other vital details.

11. To compensate for the westerly set and a 1.70° West gyro compass error, Captain Michalopaulos added three degrees east to the course. The gyro course was therefore 036°, while the true course was 033°. He thus allowed only 1.3° to compensate for the westerly set. Upon grounding the ship was 12.5 miles to the west of the rhumb line. From the last star fix at 1859 hours on March 17 to the grounding at 0300 on March 18, the set had displaced the COLOCOTRONI 12.5 miles west from where it should have been. Most probably, a contributing factor to this was that the COLOCOTRONI had no tide tables on board.

12. Among these were the gyro compass, the gyro compass recorder, the fathometer, the fathometer recording device, the radio direction finder, and the radar, all of which are of particular aid in pinpointing a position when approaching a cost at night, keeping in mind that the last fix was 8 hours earlier.

13. The Third Officer, the Radio Operator and various engineering officers were unlicensed. The Second Mate, who was also unlicensed, was not on board.

sidering the substantial evidence of privity, to limitation.[14] *Waterman Steamship Corp.* v. *Gay Cotton,* 414 F. 2d 724 (C.A. 9, 1969); *Empire Sea Food* v. *Anderson,* 398 F. 2d 204 (C.A. 5, 1966), cert. den. 393 U.S. 983 (1968); *China Union Lines Ltd.* v. *Anderson & Co.,* 364 F. 2d 769 (C.A. 5, 1966), cert. den. 386 U.S. 933 (1967), reh. den. 390 U.S. 974 (1968).

As the Court of Appeals for the Fourth Circuit has stated, in the context of a libel proceeding under the Harter Act:

> "Our view of the law . . . is that charts, light lists, and similar navigation data are essential equipment for the safe navigation of a ship, that she is unseaworthy without them, and it is the duty of her owner to supply them. Such documents of course become sources of information for the navigator, and the task of securing them is often delegated to officers of the ship. Failure to supply adequate information or navigation without it may thus constitute negligent navigation or management for which they are chargeable; but it does not follow that the owner is thereby relieved by the Harter Act from liability for ensuing disaster, because the same circumstances may also amount to failure on his part to use due diligence to make his vessel seaworthy. The duty of an owner in this respect is nondelegable; and the navigation of a ship defectively equipped by a crew aware of her condition does not relieve the owner of his responsibility or transform unseaworthiness into bad seamanship." *The Maria,* 91 F.2d 819, 824 (4th Cir. 1937);[15] also see: *The Iowa,* 34 F. Supp. 843 (D.C. Or., 1940).

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14. These deficiencies are chargeable to Marbonanza and the Colocotroni brothers, since they had taken away from the Captain most of the authority and discretion relative to the maintenance and supplying of the vessel.

15. In the cited case the unseaworthiness of the vessel was attributed to the owner notwithstanding the fact that upon grounding, the cargo had been jettisoned to lighten the ship.

Within the framework of this case, it should be pointed out that this broad duty giving rise to liability on the part of the owners for damages caused by an unseaworthy vessel encompasses the obligation to put it in charge of a capable crew. See *In Re Liberty Shipping Corp., Motor Ship Don José Figueras,* 509 F.2d 1249 (C.A. 9, 1975), *Petition of United States,* 178 F.2d 243, 252 (2nd Cir., 1949); *The Trillona II,* 76 F. Supp. 50 (D.C.S.C. 1948). Exoneration of the shipowner has also been denied where the vessel was not equipped with an efficient radio direction finder and other necessary equipment, *Waterman Steamship Corp.* v. *Gay Cottons, supra; In Re: Seaboard Shipping Corp.,* 449 F.2d 132 (2nd Cir., 1971), cert. den. 406 U.S. 949 (1972), reh. den. 408 U.S. 932.

Another relevant factor which is evidence of fault on the part of the vessel was the failure to provide a bow lookout. Rule 290 of the International Rules of Navigation,[16] 33 U.S.C. 1091, which apply to high seas navigation, provides:

> "Nothing in sections 1061 to 1094 of this title shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

The International Rules promulgated by Congress are binding, of their own force, only on American vessels. How-

16. This set of International Rules, 33 U.S.C. 1061-1094, came into force as a result of recommendations of the International Conference for the Safety of Life at Sea of 1960, 16 U.S.T. 185. See, Exec. Order No. 11239, 32 Fed. Reg. 16247 (1965); Gilmore & Black, The Law of Admiralty, p. 490 (Second Edition 1975). In 1963, Congress authorized the President to proclaim the new Rules, 77 Stat. 194 (1963), and they became effective on September 5, 1965. Proc. No. 3632, 29 Fed. Reg. 19167 (1964). The Rules were still effective at the time of the casualty here in question. See Pub. L. 95-75, July 27, 1977, 91 Stat. 311.

ever, Federal Courts are empowered to take judicial notice that the other maritime nations have adopted Rules similar to the American provisions.[17] Gilmore & Black, supra, at p. 489; *The Scotia,* 81 U.S. 170 (1872). In *The Belgenland,* 114 U.S. 355, 370 (1885), the Supreme Court stated:

> " . . . [F]or more than twenty years past, all the the principal maritime nations of the world (at least those whose vessels navigate the Atlantic Ocean), have concurred in adopting a uniform set of rules and regulations for the government of vessels on the high seas. These rules and regulations have become international, and virtually a part of the maritime law. *They will be presumed to be binding upon foreign as well as domestic ships unless the contrary is made to appear.*" (Emphasis added. Citations and footnotes omitted.)

The COLOCOTRONI should have been at great pains in securing a correct course while navigating at night near the coast. Under such circumstances, she was bound to a high degree of vigilance and should have posted an effective lookout. See *British Columbia, Co.* v. *Myeroire,* 259 U.S. 1(1922). A clear rule of international navigation was transgressed by this omission. This constitutes further indicia of negligence. See, *Belden* v. *Chase,* 150 U.S. 674, 698 (1893); *The Clereco,* 154 F. 2d 605 (C.A. 6, 1946); Gilmore & Black, supra at p. 489.[18]

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17. The International Convention for the Safety of Life at Sea of 1960, supra, was ratified by the United States (August 2, 1962), proclaimed by the President on March 24, 1965, Greece (February 13, 1963) and Panama (February 4, 1963). 6B *Benedict on Admiralty,* p. 1064. It is interesting to note that several of the ship's papers (such as the radio telegraphy certificate issued by the inspection service of the Ministry of Merchant Marine of Greece) and various correspondence and directives from the owners, make specific reference to the application of this Convention to the operation of the COLOCOTRONI.

18. It is a well established rule of collision litigation that a presumption of fault attaches to a moving vessel which collides with a

At the time of the grounding the COLOCOTRONI was also in violation of provisions of the International Convention for Safety of Life at Sea of 1960, supra, which imposes certain operational requirements on navigational equipment (Regulation 9(t), Ch. IV, Part C), such as properly calibrated and operative direction finders. (Regulation 11; also see Ch. V, Regulation 12). We have no doubt that the COLOCOTRONI was bound to comply with the safety provisions of this International Agreement. [19] It is also clear to us that the faulty equipment aboard the vessel was instrumental in bringing about the casualty giving rise to the present action. This state of affairs is not only indicative of negligence on the part of the Defendants, but also brings into play the application of the so called Pennsylvania Rule whereby a presumption is raised to the effect that these violations were a contributory cause of the disaster. *The Pennsylvania,* 86 U.S. 125 (1873); *The Martello,* 153 U.S. 64 (1894); *Waterman Steamship Corp.* v. *Gay Cotton,* supra.[20]

Moreover, apart from the applicable presumptions, we are convinced that the unseaworthiness[21] of the COLOCO-

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fixed object, making a prima facie case of fault or negligence against the vessel. See *The Oregon,* 158 U.S. 186 (1895); *Brown & Root Marine Operators Inc.* v. *Zapata Offshore Co.,* 377 F. 2d 724 (C.A. 5, 1967); *Petition of M/V Elaine Jones,* 480 F. 2d 11 (C.A. 5, 1973).

19. See n. 17, supra.

20. The Pennsylvania Rule, although originally developed in connection with collision law, is applicable to strandings. *Richelieu & Ontario Navigation Co.* v. *Boston Marine Insurance Co.,* 136 U.S. 408, 422-423 (1889); cf. *Director General of India Supply Mission* v. *SS Maru,* 459 F. 2d 1370 (C.A. 2, 1972).

21. We recognize that the COLOCOTRONI and its owners owed no duty to provide the Commonwealth of Puerto Rico with a seaworthy vessel, in the sense that said doctrine of absolute liability is traditionally invoked. See, *State of Maryland Dept. of Natural Resources* v. *Amerada Hess Corp.,* 350 F. Supp. 1060, 1070-1071 (D.C. Md., 1972). However, the Commonwealth's suit is not precisely couched in terms of a privity between the parties. Our finding of unseaworthiness in this case thus constitutes another indicia of negligence on the part of the Defendants. See, generally, Gilmore & Black, supra, Chapter VII.

TRONI and the negligence of her owners proximately caused the injuries asserted herein. There is a "causal relation" between the acts or omissions and the injury, if the things done or omitted produce immediate danger of injury and are substantial factors in bringing it about, even though the precise result may not be foreseen. *Interlake Iron Corporation* v. *Gartland S.S. Co.*, 121 F. 2d 267 (C.A. 6, 1941), cert. den. 314 U.S. 681 (1941). Clearly the deplorable condition of the COLOCOTRONI was within the knowledge of her owners. In light of the attending circumstances, they ought to have foreseen the probability of injury as a result of the vessel's unseaworthiness, as it existed at the commencement of the casualty voyage.[22] See *Reynolds* v. *Atlantic Coast Line R. Co.*, 196 F. 2d 643 (C.A. 5, 1952).

In view of the foregoing,[23] we hold that the owners of the COLOCOTRONI are responsible for the damages resulting from the dumping of oil undertaken to save the stranded vessel.

THE STANDING OF PLAINTIFFS TO RECOVER

One of the issues in Civil Number 252-73 deals with the standing of the Commonwealth and the E.Q.B. to sue for damages.

As stated previously, the oil slick came ashore at Bahía Sucia, in Cabo Rojo, Puerto Rico. The Commonwealth and E.Q.B. are claiming damages for the environmental damage caused by this pollution to the natural resources of this area.

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22. It is our opinion that the likelihood that oil might have to be jettisoned from the stranded vessel was one of the hazards inherent in her unseaworthiness. See *2 Restatement of the Law, Torts 2nd*, § 449 (1965); Cf. *The Maria*, supra.

23. And also considering the procedural history of this litigation, see n. 6, supra.

The Commonwealth of Puerto Rico is a sovereign organized within the legal and political framework of the United States (48 U.S.C. 731-916; 1 L.P.R.A. (Constitution of the Commonwealth of Puerto Rico); *Mora* v. *Mejías*, 115 F. Supp. 610 (D.C.P.R., 1953); aff'd 206 F.2d 377 (C.A. 1, 1953); Resolutions of the General Assembly of the United Nations of November 3, 1953, A/C.4/ L 300, and November 27, 1953, A/PV 459), which possesses many of the attributes of a State. *Mora* v. *Mejías*, supra, (C.A. 1, 1953); *Ursulich* v. *P.R. National Guard*, 384 F. Supp. 736 (D.C.P.R., 1974). As a sovereign it represents the collective interests of the People of this jurisdiction. The Commonwealth holds title in trust to the public property and domain, and is charged with the protection of the People's interest in the same. 1 L.P.R.A., Const. P.R. Art. VI, Sec. 8; 1 L.P.R.A. 2; see *Geer* v *Connecticut*, 16 U.S. 519, 529 (1859). In the execution of these endeavors the Commonwealth may bring legal actions in court to protect its property and to recover damages to the same. 3 L.P.R.A. 73.

The United States has transferred to the Commonwealth all interest it had in the navigable waters of Puerto Rico and their resources, and in the submerged lands and their resources. See 48 U.S.C. 746, 747, 749. The Commonwealth has title to all beaches and to the maritime terrestrial zone abutting the navigable waters, and in particular to the mangrove areas which are a part of the same. *Robert Armstrong* v. *Commonwealth*, 97 P.R.R. 573 (1969). The Commonwealth is thus the owner of both the living and nonliving resources located in the navigable waters of the Commonwealth and those on the bottom ands its subsoil, as well as those located within the referred to maritime-terrestrial zone. 12 L.P.R.A. 43, 44. See *McCready* v. *Virginia*, 94 U.S. 391, 394 (1876); *Toomer* v. *Witsell*, 334 U.S. 385, 408 (1947); *Manchester* v. *Massachusetts*, 139

U.S. 240 (1890); *Skiriotes* v. *Florida*, 313 U.S. 69 (1941).

The Commonwealth therefore has standing to sue to recover for oil pollution harm to Bahía Sucia and related resources because it has a proprietary interest in the same. (*State of Maine* v. *M/V Tamano*, 357 F. Supp. 1097, 1098-1099 (D.C. Me., 1973); *State Department of Fish and Game* v. *SS Bournemouth*, 307 F. Supp. 922, 926-930 (C.D. Cal. 1969)), and because it is the trustee of the public trust in these resources. *Geer* v. *Connecticut*, supra, at 534; *State of Maryland, Department of Natural Resources* v. *Amerada Hess*, supra, n. 20 at 1065-1067; *State Dept. of Environmental Protection* v. *Jersey Central Power & Light Co.*, 308 A. 2d 671 (N.J., 1973); see *"The Public Trust Doctrine in Natural Resource Law: Effective Judicial Interaction."*, 68 Mich. L. Rev. (1970); *"Environmental Law—Public Trust-Inquiry to Public Trust as Basis for Award of Damages"*, 5 Seton Hall L. Rev. 394 (1974). Additionally, in its capacity as *parens patriae*, the Commonwealth has a sovereign interest in the general welfare of its citizens which transcends any injury which may be caused to its proprietary interests or to the property of its individual citizens. Particularly when a nuisance of disastrous proportions occurs such as in the case of a maritime oil spill, the special status of the body politic vis-a-vis its citizens gives rise to a right to seek redress on behalf of the collective community which is not limited to the abatement of the nuisance, but which can allow for recovery for damages by the body politic. *Missouri* v. *Illinois*, 180 U.S. 208, 241 (1901); *Louisiana* v. *Texas*, 176 U.S. 1 (1900); *Georgia* v. *Pa. R. Co.*, 324 U.S. 439, 447 (1945); *Georgia* v. *Tenn. Copper Co.*, 206 U.S. 230, 237 (1907); *Maine* v. *M/V Tanamo*, supra. See, *"State Protection of Its Economy and Environment, Parens Patriae Suits for Damages"*, 6 Col. J of L. & Soc. Prob. 411 (1970).

The E.Q.B. is clearly granted standing to sue for environmental damages by its enabling statute. 12 L.P.R.A. 1131 (29). It of course, does not recover damages separate and apart from the Commonwealth.

PLAINTIFFS' DAMAGES AND RELATED SUBJECTS

Bahía Sucia

The issue of the damages suffered by Plaintiffs and the recovery to which they are entitled, which are the real cruxes of the present cases, must necessarily begin with a description of the impacted areas as well as of the various flora and fauna within their confines, as they existed in March, 1973, *prior to the spill.*

Bahía Sucia is a half-moon shaped bay which, as previously stated, is located in the extreme Southwestern part of Puerto Rico. (See Appendix A). Its westernmost point is Cabo Rojo and its eastern boundary is Punta Molino. There is a distance of approximately 2 miles from point to point across the mouth of the Bay, and of 4 miles along the beach.

Bahía Sucia faces the southeast. The center of the half-moon is about 4 miles to leeward of Arrecife Margarita, and 8 miles to leeward from the site of the COLOCOTRONI's grounding. The prevailing daytime winds and the normal currents are generally from an easterly and southeasterly direction, in line with the location of the grounding, Arrecife Margarita and the mouth of Bahía Sucia. During the nighttime the wind usually shifts to the north or northeast. The average rainfall for this area is 30 inches a year, offset by an evaporation rate of 80 inches. By reason of this high rate of evaporation, the area is classified as semiarid.

The shoreline, commencing at the western extremity of the Bay, is mostly composed of rocky limestone to the

water's edge, with some fringe coral. These characteristics remain unaltered for approximately three quarters of a mile until the shoreline begins to curve to the north.[24]

There a thin line of mangrove appears, increasing in width as the shore curves to the north. About a quarter mile from that point there is a small strip of sandy beach referred to as "Dogman's Cove."[25] Immediately thereafter there exists a cove, which is formed in part by a peninsula of mangrove, referred to as "Hermit One."[26] This cove is entirely surrounded by mangrove which goes inland to a width of several hundred yards in places, and whose total area is in the vicinity of 50 acres. On the land side of this mangrove area there is a large flat which borders on the west with a dirt road. This flat, which was inhabited by large numbers of crab, is flooded by the tide at high water. Several scattered stands of dead mangrove stood on the southern edge of this flat. Proceeding north from this mangrove area, which is generally referred to as the "West Mangrove",[27] the shoreline becomes white calcareous sand for the next mile and three quarters, and curves in a northeasterly direction. This beach was inhabited mostly by hermit and sand crab. Immediately inland of this portion of the Bay, separated by a thin strip of brush covered land, is a large salt water lagoon several hundred acres in area, which is subdivided into evaporating ponds for the nearby salt factory. Behind the extreme eastern end of the beach there is another flat which is also flooded by the tide and was inhabited by ghost crabs *(Ocypode albican)*

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24. Inland of this location there is a large landlocked salt water pond separated from the Bay by a thin strip of land. Considerable dead mangrove was evident in the lagoon, unrelated to the present case.

25. This is not an official name, but a label that was given by the Court for easy reference to this location.

26. Id.

27. Id.

and fiddler crabs *(Uca sp.)*. At this end of the beach there commences another area of mangrove which runs east for about a mile. It stops short of Punta Molino. This mangrove area is referred to as the "East Mangrove",[28] and its width inland rarely reaches 50 yards from the shore. Much of the landward side of this mangrove stand contained patches of dead mangrove.

The mangrove that borders on the ocean fringe throughout Bahía Sucia is a species referred to as red mangrove *(Rhizophora mangle)*. This mangrove has both main and proproots, in which are located lenticels or pores for gas exchange. These lenticels facilitate root respiration. Various epibenthic species such as tree oysters, snails, crabs, sponges and molluscs dwelled in these roots systems.[29] In the waters surrounding these roots, communities of fish, shrimp and floating or swimming organisms throve. The bottom around the roots was inhabited by various benthic infauna.[30] The bottom near the red mangrove was covered with both turtle grass *(Thalassia testudinum)* and manatee grass (*Syringonium sp.*).

Further inland from the fringe, as the interstitial salinity rises, the red mangrove is supplanted by the black mangrove (*Avecennia nitida*). This mangrove inhabits a zone systematically flooded by the tide, and rather than prop roots, it has fingerlike breathing tubes (called neumata-

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28. Id.

29. Included were annelids (*Polychaete* families of several types), arthropods (*Amphipoda, Cirripedia, Decapods/Brachyrhyncha, Majidae* and *Caridea, Isopoda, Tanaidacea*), coelenterates (*Hydrozoa*), molluscs (*Bivalvia, Gastropoda,* and *Aspidobranchia*), sponges (*Porifera,* encrusting tan sponge), chordates (*Tunicata,* colonial and solitary; and fish larvae), algae (*Bostrichia sp.,* Filamentous Types A, B and C, *Caulerpa racemosa,* Red Filamentous Type C), roundworms (Nematode-Type A).

30. Included were annelids (*Polychaete* families of several types) roundworms (*Neimatoda*), anthropods (*Amphipoda,* and *Isopoda*), coelenterates (*Anthozoa*), echinoderms (*Ophuiroidea*), molluscs (*Bivalvia, Gastropoda* and *Aspidobranchia*), ribbonworms (*Nemertinea*) and sponges (*Porifera*).

fors) which rise from the ground to above high water level. This area provided a habitat principally for crustaceans such as crabs and barnacles, and algae grazing snails, bees and reptiles. There were also benthic infaunal communities similar in nature to those in the bottom surrounding the red mangrove fringe.

The canopy of the mangrove forest was inhabited by various bird species.

The configuration of the bottom of Bahía Sucia is of some relevance. The average depth at the middle of the mouth is about 4 fathoms, or 26 feet. From there the bottom slopes gradually, paralleling the shore in half-moon fashion until it reaches land. With the exception of one small reef, Roca Ola, located about one mile due east of Hermit One, the bottom was white calcareous sand covered mostly by turtle grass. Both pelagic and neritic fish species inhabited these waters. Additionally various epibenthic species[31] such as starfish, sea urchins, brittlestars, snails, limpets, hermit crabs, sea cucumbers, lobsters, helmet conch, and sponges were found in the *Thalassia* beds, and again substantial benthic infaunal communities[32] existed beneath them. The *Thalassia* is a basic food source for sea turtles and manatees.

As its name seems to imply, Bahía Sucia, because of its location and configuration as well as by reason of the prevailing winds and currents, collects and traps much debris

31. Included were annelids (*Polychaete* families of several types), arthropods (*Decapoda, Paguridae, Brachyrhyncha, Penaidea, Scyllaridea, Majidae* and *Acarina*), coelenterates (*Anthozoa* and *Zoanthidea*), chordates (*Tunicata*) echinoderms (*Crinoidea, Echinoidea* /sea urchins/, *Holothurioidea, Asteroidea,* and *Ophiuroidea,* molluscs (*Bivalvia,* eight *Gastropoda* genera, and *Polyplacophora*) and, sponges (*Porifera*).

32. Included were annelids (*Polychaete* families of several types), roundworms (*Nematoda*), arthropoda (*Amphipoda, Decapoda, Pycnogonida* and *Isopoda*), coelenterates (*Anthozoa*), chordates (*Tunicata*), echinoderms (*Ophiuroidea, Echinoidea* and *Holothurioidea*) and molluscs (Five *Bivalvia* genera, thirteen *Gastropoda* genera, and *Polyplacophora*).

along its shores. Among the matters that periodically came ashore were small amounts of petroleum products.[33] This is mostly discernible to the eye in the form of tar balls,[34] which can be best seen in the sandy areas of the shore.

Notwithstanding this, it is clear to us that at the time of the casualty in question Bahía Sucia was a healthy, functioning estuarial ecosystem, typical of those found in the Southern coast of Puerto Rico and similar tropical environments. The function and interrelationship of such systems are scientifically well-established and understood.[35] The mangrove components of these systems are of prime importance. These areas are breeding, feeding and nursery grounds for substantial populations of the species previously mentioned. Additionally the mangroves themselves, and in particular the red mangrove, are the primary food-producing agents of the organic materials available to the aquatic food chain.

The *Thalassia* beds perform a similar but less prominent function than do the mangrove, providing both habitat and an important component in the food chain of the various species referred to previously.

The oil spill and the cleanup

As the oil slick started arriving in Bahía Sucia on March 18-19, 1973, its initial point of impact was the southwestern third of the half-moon.

By 0755 hours of March 19, with the wind due east, three separate pools of oil had formed against the shore of Bahía

33. The apparent result of fortuitous bilge cleaning by ships at sea.

34. The sizes vary anywhere from almost microscopic to several inches in diameter. How they form and their relevance, if any, to this case are discussed later in this opinion.

35. Ex. see, *Coastal Ecosystem Management*, John R. Clark, John Wiley & Sons, New York, in particular the contributed articles, "Mangrove Swamps", by Lawrence Burns, pp. 660-665, and "Sea Grass Beds", by Joseph Zieman, pp. 702-704.

Sucia: one was located against the rocky shore at the western extremity of the Bay, the second was in the West Mangrove, extending from Dogman's Cove to and including the mangrove around Hermit One, and the third was along approximately 3,000 feet of the beach to the north of the second oil pool. The oil was black and thick, particularly in the West Mangrove and in the beach areas. In the West Mangrove the oil was several inches thick and completely enveloped all areas subject to tidal flow. The oil there reached into all the recesses including Dogman's Cove and Hermit One, which were totally surrounded by oil. Because of the rise and fall of the tide, the intertidal portions of the main and prop roots of the red mangrove, and the roots and neumatafors of the black mangrove in this area were covered by oil to a height of about one foot above their low water level. At high tide, the oil also floated into the flats behind this area.[36]

Meanwhile, early on the 19th of March, a large cleanup force composed of members of the United States Coast Guard and various Commonwealth Agencies which had been alerted to the spill, began assembling in Bahía Sucia together with sundry cleanup gear. This force was under the general supervision of the Coast Guard and so remained throughout the cleanup operation.

At about 0830 hours the wind began shifting slightly to the south. A boom was deployed north of the oil in the beach area to keep the oil from moving further along the beach. In view of the fact that the oil was several inches thick, at about 0945 hours a sump was dug next to the shore

36. The Bahía Sucia area is subject to two tides per day. The highest spring tide occurred on March 18, when it was full moon. The following is the height of the spring tides on the relevant days:

March 17, 1973 ..... 1.2 feet
March 18, 1973 ..... 1.3 feet
March 19, 1973 ..... 1.3 feet
March 20, 1973 ..... 1.3 feet
March 21, 1973 ..... 1.2 feet

allowing oil to flow from the sea into it. From here the oil was pumped directly to a tank truck, while additional equipment was rounded up. By 1210 hours[37] the pool in the beach contained by the boom had become quite large, extending in some places 100 yards from shore. The wind was steady from the south-southeast. Throughout the day additional cleanup efforts continued, including the construction of more sumps on the beach. Large holding pits were built next to two of the sumps to store oil and three pumping stations were established.

On March 20 more tank trucks were put in operation. By 1800 hours on that day, 35,000 gallons of oil had been removed from the water. By 1700 hours on March 23 this had increased to 405,000 gallons. Throughout the pumping operation oil purity averaged between 85% and 95%.

In the meantime, although most of the oil from the pool at the entrance to the Bay had moved into the beach area, the situation in the West Mangrove remained substantially unaltered. The reasons for this were varied. The characteristics of the terrain and vegetation made it extremely difficult, if not impossible, to effectively carry out the removal of oil. This, as well as the geographic configuration of that area, prevented any flushing by wave and tide action. Additionally, during the initial five and a half day period, the trade winds blew from the east-northeast during the night and south-southwest during the day at a steady 15-20 knots, thus keeping the oil contained within the mangrove pocket.

To prevent a southerly wind shift from spreading the oil north along the beach, another boom was placed perpendicular to the beach and just north of the original boom. The daily shift in wind created a slow current from north to

37. At about this time some of the cleanup personnel and equipment had to be diverted to contend with a portion of the main body of the slick, which had rounded Cabo Rojo and turned north in the Mona Passage, and was threatening the beach at Punta Aguila. This threat never materialized.

south and vice versa. Meanwhile the oil against the boom reached 4 to 6 inches in thickness. This, together with the current, caused various failures in the containment system which had to be corrected by improved anchoring of the boom.

During the early afternoon of March 24, the winds began to veer past their usual southeasterly limit and moved to west of south. This increased the pressure of the oil on the booms already in place and these began to fail. Oil from the West Mangrove started to move north into the Bay, offshore and past the boom. By 1830 hours there was a large slick extending from the West Mangrove to the north, with about 50% passing the northernmost boom. The work crews proceeded to close the sea water intake channel of the salt works located just before the western edge of East Mangrove. It was also discovered that oil was touching the westernmost stand of East Mangrove. At this point the wind died, resurging from the north at 2330 hours. An additional 1½ miles of beach were fouled by this episode.

The wind remained northerly throughout the night and at 0800 hours of March 25 was still from the north-northeast at 4 to 6 knots. The oil moved away from the East Mangrove's edge and a large black slick covered most of Bahía Sucia, heading south-southwest. A large portion of this slick went out to sea around Cabo Rojo, but the remainder went back to the original areas at the rocky entrance and at the West Mangrove, accumulating there in fairly heavy thickness. The length of shoreline now impacted was nearly 3 miles. The Coast Guard established a new pumping station in the rocky area, but could do nothing about the oil remaining in the West Mangrove.

At 1300 hours the wind again backed to the south and again threatened the East Mangrove. A boom was placed to prevent this. That night some oil reached the boom. By the morning of the 26th, the normal east-northeast trade

wind had returned. Although only 25,000 gallons of oil were removed from the scene during the 42 hours between the various wind shifts, an overflight of the area at 1500 hours revealed that only about 10% of the original oil now remained on the beach area. Of this, the great majority was concentrated at the booms. The remainder was spread along a thin band from the booms south to the original sump.

It became apparent that the West Mangrove had lost at least half of its oil during the wind shifts. Small amounts of oil out of this mangrove began moving towards the original sump area on the 27th. A limited pumping operation was made feasible by this displacement.

The main pumping operations in the northeastern section of the beach continued. By 2000 hours on the 26th of March, 500,000 gallons had been removed by tank truck to the consignee's refinery. By 1900 hours on the 27th this had reached 550,000 gallons, which had increased on the 28th to 590,000 gallons and to 630,000 gallons by March 29. In addition to this amount there were 125,000 gallons stored in reservoirs in the beach awaiting removal, which made a total of 755,000 gallons of oil that had been physically removed from the water in the beach area since the start of operations.

Late during the 28th of March the wind veered to the south and large slicks moved out of the mangroves and into the beach area. Late that evening the wind went even further west. On the morning of the 29th the wind was southwest to west-southwest at 4 to 6 knots. There were black slicks throughout the bay headed for the East Mangrove. As the wind continued from southwest to west-southwest during the entire day, oil impacted the entire shore, from the westernmost point of the East Mangrove to Punta Molino and around this point to the east, nearly to Punta Pitahaya. The physical size of the area involved was tri-

pled, although the new zone was not hit by heavy concentrations of oil.[38]

From the 29th of March until the 3rd of April the winds remained variable and the oil slick moved back and forth in Bahía Sucia. A large slick rounded Cabo Rojo and brought traces of oil into the Mona Passage.

By the 1st of April, the pumping operations were over. Cleanup operations continued in the rocky entrance area and in the beach area between the boom and the commencement of the East Mangrove, an area where a thin layer of oil was located away from the shore. An additional boom was deployed to completely enclose the West Mangroves, and this boom, which extended approximately 3500 feet, was in place by April 3. When the trade winds returned, oil started to move out of the East Mangrove and the mangrove east of Punta Molino. An additional 500 feet of boom were placed at the western end of the East Mangrove to contain this oil.

By this time, the most important cleanup operations that remained involved a manual beach cleanup. This consisted principally of raking oil soaked sand and sea grasses above the waterline for eventual removal by dump truck.

On April 5, core samples revealed that oil penetration of the sand in the intertidal zone averaged 8 to 10 inches and in some places was as much as 14 inches deep. Further samples taken on April 12 disclosed that this thickness was rapidly decreasing.

In the West Mangrove the cleanup was extremely laborious. Heavy equipment became stuck in the soft ground. The mangrove was so dense that in many places it was impossible to enter it without destroying it. Pockets were cleaned several times, yet oil would leak out from under the mangrove roots. Twelve aluminum boats were used as floating containers for oily sorbents and debris. Free oil

38. This made the cleanup even more difficult because the oil could not be quickly pumped out.

was bailed up with buckets and oily sea grass forked directly into the boats. When filled, the boats were towed back to an access point on shore and emptied. A dump or tank truck would then remove the matter to the Mayaguez public sanitary land fill dump, about 20 miles away.

The surface of the tidal flat behind this mangrove was covered by a thin layer of weathered oil which, as stated previously had reached the area on the first night after the spill. Because this is a breeding area for small crabs, it was agreed that it was best to leave it undisturbed.

In the area of the beach, sumps and reservoirs were appropriately cleaned and filled after emptying, and the contaminated sand removed by dump truck. Substantial oily material was removed from the beach by bulldozer and manual labor. In the shallow water, there were tar deposits that were removed by hand. The heavy equipment operations destroyed considerable vegetation. It is estimated that a total of 4500 cubic yards of contaminated sand were removed during the entire operations.

The East Mangrove was not badly contaminated. The wind aided in pushing most of this oil into the boom, as previously described. Thereafter, the cleanup proceeded manually which was more feasible in view of better footing on the shore side of this mangrove.

The oil in the area east of Punta Molino was cleaned by natural wind and sea action. This area was secure by April 17.

By the 25th of April all cleanup operations were concluded in the beach areas and East Mangrove, with the exception of the area immediately adjacent to West Mangrove, where operations ended on May 4. The entrance area cleanup had ended on April 14.

Commencing on April 25, the boom encircling the East Mangrove was taken out, and by May 3, only 750 feet were left encircling some pockets in the mangrove. All operations were now concentrated in this area. A long suction

hose of some 400 feet was fabricated, which permitted a few isolated pockets of oil to be vacuumed out. However, most of the work was manual.

On May 1, the walls of the salt water works intake channel were sandblasted.

By June 1, the operations in the East Mangrove had been reduced to once a week collections of oily sea grass and sorbent material and by June 6, this schedule was further reduced to once every two weeks. A storm on August 15 provided good flushing action for the mangrove roots.

By September 24, further cleanup operations were deemed futile and thus were discontinued.

The chemistry of oil and its effects

It is impossible to properly evaluate the extent of damages caused by the oil spill previously described without a rudimentary understanding of the physical properties of petroleum.

Petroleum, or as it is commonly referred to, crude oil is a complex mixture of paraffin, naphthalene, and aromatic hydrocarbons, containing small amounts of organic sulfur and very small amounts of nitrogen and oxygen compounds, as well as the traces of various metals. The total analysis of all the chemical substances in oil has not yet been performed. It is scientifically established, however, that the composition of crude oil, as far as compounds containing carbon and hydrogen, runs approximately 20-30% paraffin or aliphatic hydrocarbons, 20-50% naphtalenes, and 15-40% asphalts, each of these compounds having their own chemical and physical characteristics. The variations in these percentages are reflected by the geographic location of the oil field due to the fact that different vegetation and other organic life matter may go into the original formation of the oil. This has more relevance to this case than just passing scientific interest. This composi-

tion in large part has a relationship to the relative toxicity of the oil, and more importantly, because the different sources of petroleum have been catalogued, it permits the identification through "fingerprinting" of petroleum found in the field.

The paraffin or aliphatic hydrocarbons in oil are very unreactive. Mineral oil and vaseline are examples of purified mixtures of paraffin. By virtue of their heavy molecular structure they are virtually nontoxic.

Naphthenes are very complex mixtures of hydrocarbons, naphthenes and alkanes. They are lighter than the aliphatics and thus more toxic.

The aromatic compounds in oil are the most reactive and toxic. Some of these, like benzene and naphthalene have a low boiling point, and although highly poisonous to marine life, evaporate with rapidity.

Hydrocarbons are ubiquituous in nature and are thus found in the environment in many forms beside spilled oil. All organisms whether plant or animal, produce hydrocarbons in their normal metabolisms. However, several things distinguish petroleum from natural hydrocarbons. Because petroleum is formed under heat and pressure, its hydrocarbons are "scrambled up." Furthermore, petroleum hydrocarbons contain certain hydrocarbon compounds called isprenoids, pristane (C_{17}) and phystane (C_{18}), whose joint presence is found only in oil of petroleum origin.

By the use of gas chromatography and the determination of the pristane-phytane ratio in the oil, it is possible to identify its source. This is true even after the weathering of the petroleum, because these ratios remain fairly constant throughout its life.

The analysis of petroleum for positive identification is also possible by the use of infrared spectrography and atomic absorption spectrophotometry for a determination of the vanadium-nickel, and sulfur-nitrogen ratios.

The evidence in this case clearly establishes that the oil found in Bahia Sucia and that carried aboard the COLOCOTRONI were identical: Tia Juana crude, medium. From this evidence as well as the evidence of the physical coverage of the oil spill, it can not be doubted that the source of the oil in Bahia Sucia was the COLOCOTRONI.

In terms of affecting the environment, when oil is spilled it generally exhibits the following pattern. The aromatic fractions, which as stated previously are the most toxic, evaporate within the first few hours or days. In the meantime, they have lethal effects on marine organisms that come in contact with them. Particularly susceptible to this phenomenon are the epibenthic and benthic communities in shallow waters such as those of the Bahia Sucia estuary. The heavier fractions of petroleum, specially in the initial phases of a spill, operate more as a mechanical than a chemical impediment. The oil, which is initially lighter than water, floats on the surface. Its dark color causes a rise in the temperature of the water below its surface. This affects the flora and fauna, some of which are highly sensitive to temperature changes. Additionally, the oxygen exchange in the water and air are also impeded. As the sun and air contact cause the lighter fractions to evaporate, the remaining heavier fractions become more viscous. These thicker portions kill the various marine organisms, particularly in the intertidal zones, mainly by preventing movement and by interfering with gas exchange. With time, some oil settles into the sediment. There the process of decomposition is very slow, being catalyzed only by anaerobic bacteria. Although in this state the oil is probably neutral in its effect on the various epibenthic and benthic infaunal communities, it allows a disproportionate number of distress area organisms, such as *capitella* worms and blue-green algae, to displace the normal communities. Furthermore, for a prolonged period of time walking on the affected bottoms brings forth a sheen of oil and coats

the contact surfaces with a black substance.[39] With the passage of time, the oil that coats the surface and is in direct contact with oxygen and sunlight weathers to the point of becoming tar and has no further ascertainable effect on the environment.

Detail of damages caused by the oil spill

Bahía Sucia was heavily impacted by oil as a result of the COLOCOTRONI incident. Most affected were the West Mangrove and beach areas and consequently the flora and fauna of that locale. Immediately after the spill, and as a result thereof, the mangrove root communities in that area were decimated. A similar result was experienced by the sea grass communities in those impact areas and the crab populations in the flats. Additionally, various areas of red mangrove in the West Mangrove were affected by the spill, and as a result the mangrove mortality in this area was significantly increased.

Even at present the mangrove community in this impact area shows a significant reduction in the number of species of macrobiota, the number of molluscs and crustaceans, the epiflora cover, the number and frequency of epiphyte species, and the number of species and population density of epibenthic and infaunal molluscs and crustaceans. The seagrass community shows a significantly altered pattern of plant biomass[40] and in the number of species and population density of macro biota. This community, however, shows greater relative recovery than the West Mangrove community.

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39. The amount of time is the subject of much controversy. Suffice it to say that 5 years after the spill oil was still much in evidence, particularly in the West Mangrove areas visited by the Court.

40. As previously stated, of critical importance to the marine food chain.

In our opinion, the oil spill damages to the East Mangrove are of minor significance to this case.[41]

From the above, the following specific damage was caused to the Commonwealth Plaintiffs:

1. Plaintiffs' proven claim of damage to marine organisms covers an approximate area of about 20 acres in and around the West Mangrove. The surveys conducted by Plaintiffs reliably establish that there was a decline of approximately 4,605,486 organisms per acre as a direct result of the oil spill. This means that 92,109,720 marine animals were killed by the COLOCOTRONI oil spill. The uncontradicted evidence establishes that there is a ready market with reference to biological supply laboratories, thus allowing a reliable calculation of the cost of replacing these organisms.[42] The lowest possible replacement cost figure is $.06 per animal, with many species selling from $1.00 to $4.50 per individual. Accepting the lowest replacement cost, and attaching damages only to the lost marine animals in the West Mangrove area, we find the damages caused by Defendants to amount to $5,526,583.20.

2. The evidence is overwhelming to the effect that the sediments in and around the West Mangrove continue to

41. More accurately stated, Plaintiffs have failed to support their claims for damages in that area.

42. As explained previously, the affected flora and fauna were part of a trust held for the people by the Commonwealth of Puerto Rico. See, *Lacoste* v. *Department of Conservation*, 263 U.S. 545, 549 (1924); *Geer* v. *Connecticut*, supra. Perforce, the Commonwealth must have the ability to have the corpus of said public trust reimbursed for the diminution attributable to the wrongdoers. *State Dept. of Environmental Protection* v. *Jersey Central Power & Light Co.*, supra. at 673-674. We recognize that no market value, in the sense of loss of market profits, can be ascribed to the biological component of the Bahía Sucia ecosystem. The Court will thus refer to market cost as the most reliable evidence of the quantum of damages actually sustained, i.e., what is required to make the Plaintiffs whole. This will comprise the cost of restoring the affected areas to the condition in which they were before the occurrences. *See Feather River Lumber Co.* v. *United States*, 30 F. 2d 642, 644 (C.A. 9, 1929).

be impregnated with oil. The solutions proposed by Plaintiffs to this problem are inacceptable in that they would bring about the total destruction of this environment without any real guarantee of ultimate success. Furthermore, there is substantial scientific evidence to the effect that much of the undesirable effects of the oil in the sediments will be corrected in time by the weathering processes of nature. The most affected spots in the West Mangrove cover an area of approximately 23 acres. It is the Court's opinion that these areas can best be reestablished by the intensive planting of mangrove and restoration of this area to its condition before the oil spill. The evidence shows that the planting of mangrove runs at about $16,500 per acre, thus bringing the cost of replanting 23 acres to $379,500. The evidence further demonstrates that the planting will require a five year monitoring and fertilizing program which will cost $36,000 per year or $180,000 for the five years. The total damages thus suffered by Plaintiffs by reason of the pollution of the mangrove in the West Mangrove amount to $559,500.

3. Plaintiffs incurred in cleanup costs in the amount of $78,108.89 which were not reimbursed from any source and they are entitled to recover said damages from Defendants.

UNITED STATES' REQUEST FOR INTEREST, PENALTIES AND ATTORNEYS' FEES

On November 8, 1977, the second day of trial, the Defendants moved for summary judgment in favor of the United States in the full amount of the Government's cleanup claim, i.e., $677,660.42. The Court granted Defendants' Motion, whereupon the participation of the United States was limited to the issues of interest, penalties and attorneys' fees. We proceed to address these questions separately.

The question of prejudgment interest

We are called upon to decide whether the United States is entitled to prejudgment interest on the amount awarded to it for its total oil pollution cleanup expenses, and if so, from what date and at what percent. A brief summary of the relevant factual background is pertinent to this endeavor.

Just as the oil slick from the COLOCOTRONI impacted the shore at Bahía Sucia, the United States and the Commonwealth of Puerto Rico began to undertake the massive and painstaking cleanup operations that have been described in the present opinion. Those efforts to thwart and ameliorate the devastating potential of the spill continued until no further cleanup was feasible.

At the incipient stages of the operations, attempts were being made by the Coast Guard in San Juan to identify and contact the responsible party. At 0805 on March 19, a Mobil Oil Company representative informed the Coast Guard that he expected Mobil to assume full cleanup responsibility, but had not yet received confirmation from the head office in New York. About an hour and a half later said representative indicated that Mobil was trying to obtain permission from the vessel's owner to cleanup the oil at the direct expense of the owner. Meanwhile, the Commonwealth Government moved to have the ship restrained until the responsibility for the occurrences could be ascertained and worked out.

Initially, the Public Works Department of Puerto Rico assumed the responsibility of subcontracting equipment. This department was given full assurance that the Coast Guard would assume full financial responsibility should the polluter refuse to accept the costs of the cleanup. An oil pollution fund was then requested and granted by the Commander, Seventh Coast Guard District at 1600.

At 1605 a call was received from the Mobil Office in New York. Mobil informed that it would not accept the costs,

but that they were attempting to contact the insurance underwriters for the vessel's Federal Maritime Commission (FMC) bond. At 1932 the first call was received from this P & I Club, which was identified as the West of England Steamship Owners Protection and Indemnity Association, Ltd.

The next contact between the Coast Guard and the P & I Club occurred in the morning of March 20. The underwriters had appointed Captain William Coleman as their local representative. On March 21, at 0800 hours a meeting was held between Coast Guard representatives, members of the Environmental Protection Agency, Region II Office, Captain Coleman and Mr. George Freehil, New York representative of the underwriters. The representatives stated that the underwriters would assume all cleanup costs, commencing from the initial response. It was agreed that Commonwealth personnel would continue working under Coast Guard direction and that the underwriters would have personnel on the scene to handle finances.

The next meeting with the underwriters' representatives took place on March 30.[43] In that meeting, the underwriters stated that they were not sure of their legal responsibility if the limits of their policy liability under the Federal Water Pollution Control Act were exceeded. In view of this hesitancy, the Coast Guard acted to accept full payment responsibility for all costs incurred to insure rapid cleanup of the oil before further damage was done. All the cleanup operations were thus coordinated and paid for by the Coast Guard until their conclusion.

The total oil pollution cleanup expenses incurred by the United States Coast Guard amounted to $677,660.42[44] of

43. In the interim, great efforts were being made to pump out and control the oil slick.

44. This precise figure was the subject of Defendants' Motion for Summary Judgment which was granted from the bench on November 8, 1977.

which the last cost was incurred by the United States on November 4, 1974. Thereafter, on November 12, 1974, a bill for reimbursement of that amount was sent to Defendant Marbonanza, care of its attorneys in San Juan. That bill had six recapitulation pages attached. No supporting documents were included.[45]

The United States' cleanup costs were paid by the Defendants on April 27, 1978, nearly six months after they moved for judgment in that amount.

The United States contends that it is entitled to prejudgment interest at a rate of eight percent. Respecting the group of payments incurred on or before July 19, 1973, interest is requested from that date up to the fifth of the nearly six months its principal cleanup claim went unpaid after the Court granted Defendants' Motion for Summary Judgment. As to the second group, which comprises payments made by November 4, 1974, the Government pays for an eight percent interest to be computed from that date, up to the fifth month after November 8, 1977.

The granting of prejudgment interest lies within the discretion of the Court. *San Juan Trading Co.* v. *The Marmex,* 107 F. Supp. 253 (D.C.P.R., 1952), aff'd 212 F. 2d 206 (C.A. 1, 1954), cert. denied 348 U.S. 822. However, admiralty jurisprudence generally recognizes an injured party's entitlement to prejudgment interest whenever damages lawfully due are withheld, unless there are compelling factors to justify its denial *Grace Lines, Inc.* v. *Todd Shipyards Corp.,* 500 F. 2d 361, 366 (C.A. 9, 1974); *Ore Carriers of Liberia, Inc.* v. *Navigen Co.,* 305 F. Supp. 895, 896 (S.D.N.Y., 1969), aff'd 435 F. 2d 549 (C.A. 2, 1970); *Illigan Int'l Corp.* v. *S.S. John Weyerhauser,* 372 F. Supp. 859, 869, (S.D.N.Y., 1974), aff'd, remanded on other grounds 507 F. 2d 68 (C.A. 2, 1974), cert. den. 421 U.S. 965 (1975). This general rule is grounded on compensatory considerations, in consonance

45. The supporting documents were mailed to counsel Santiago on October 11, 1977 and received by him on October 13, 1977.

with the general purpose of awarding damages, which is to try to make the injured party "whole". *Rosa* v. *Ins. Co. of State of Pennsylvania,* 421 F. 2d 390, 393 (C.A. 9, 1970); *Interstate Steel Corp.* v. *S.S. Crystal Gem,* 317 F. Supp. 112, 122 (S.D.N.Y., 1970); also see, *Rugo Const. Co.* v. *New England Foundation Co.,* 172 F. 2d 964, 967 (C.A. 1, 1949).

Section 311(f)(1) of the Federal Water Pollution Control Act, 33 U.S.C. 1321(f)(1), provides in its pertinent part:

> "Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (2) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party . . . such owner or operator . . . shall . . . be liable to the United States Government for the *actual* costs incurred . . . for the removal of such oil . . ." (emphasis added).

Recovery under this statute is measured by the Government's actual costs regardless of their reasonableness. *Burgess* v. *M/V Tamano,* 564 F. 2d 964, 983 (C.A. 1, 1977), cert. den. 46 L.W. 3600 (1978). Since "interest" constitutes damages for the delay in the payment of money, *Nicodemisen* v. *The Dartmouth,* 157 F. Supp. 339 (D.C. Mass., 1958), its award is clearly appropriate under the above quoted section. As the Supreme Court stated in *Rodgers* v. *United States,* 332 U.S. 371 (1947):

> ". . . [T]he failure to mention interest in federal statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest. For in the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an

> appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant . . . one for whose financial advantage an obligation was assumed or imposed, *and who has suffered actual money damages* by another's breach of that obligation, should be fairly compensated for the loss thereby sustained." *Id.*, at 373 (emphasis added).

The Defendants oppose the Government's request for prejudgment interest on the following grounds: (1) that the entire responsibility for all oil spill cleanup operations was with the Coast Guard and that at no time the Defendants were ordered to clean up the oil; (2) that the United States has not been out-of-pocket, because the Federal Water Pollution Control Act has expressly created a National Contingency Fund to finance the costs of oil cleanup in navigable waters; (3) that at no time subsequent to the meeting of March 21, 1973 did any representative of the United States ever make a demand on the vessel's underwriters "to handle the finances"; (4) that although the Coast Guard mailed an invoice for the cleanup costs in November of 1974 no effort was made to support the bill until the eve of trial; (5) that the United States never made any attempt to obtain payment against a Certificate of Insurance posted by the West of England with the Federal Maritime Commission; (6) that the Government was derelict in prosecuting its claim by not opposing the Court's order consolidating it with the Commonwealth's suit for environmental damage and that this self-serving delay cannot be invoked as grounds for the recovery of interest.

Under Section 311(c)(1) of the Federal Water Pollution Control Act, the United States is empowered to remove or arrange for the removal of oil, unless it is determined that "such removal will be done properly by the owner or opera-

tor of the vessel from which the discharge occurs." U.S.C. 1321(c)(1). However, in the case at bar this provision cannot logically be read as immunizing the vessel's owners from making the United States whole for the cleanup costs incurred by it.

It clearly transpires from the record in this case that the seriousness of the COLOCOTRONI's oil spill required urgent, immediate and effective action. Considering the problems encountered by the Coast Guard in pinpointing the responsible parties, the idleness of the Defendants while the operations were taking place, their failure to take clear and affirmative steps to adhere to their avowed intention to handle finances and their hesitancy to assume responsibility at such a late date as March 20, it is beyond our comprehension how an effective oil removal by the owners or the underwriters could then be feasible. In view of these factors we fail to grasp how an appropriate exercise of the Government's statutory obligations can be invoked as a ground for denial of compensatory interest.[46]

Defendants' asserted willingness to pay since the incipient stages of the cleanup endeavors lacks support in the record. Although Defendants made a verbal commitment to handle finances "on the scene", the Coast Guard was at all times compelled to assume responsibility for coordinating the cleanup and for making payments. There may have been no express requests to pay a particular bill, but we are satisfied as to the negotiating efforts that were being made by the United States concerning the problems of financing.[47]

Nor was this willingness to pay discernible at the litigation phase. The United States action was instituted within

46. The argument that the United States could not have been deprived of the use of monies charged to a special fund is so spurious that it deserves no discussion.

47. The Coast Guard Report characterizes the episode as "tedious and frustrating negotiations with the underwriters." Exh. 20, p. 51.

a month after the occurrences and a bill in the exact amount which was eventually paid by the Defendants was forwarded to them on November 12, 1974.

Defendants nevertheless argue that they were not required to pay that bill until they received the supporting documentation during the latter part of October, 1977.

It is our opinion that when the 1974 bill was sent to the Defendants the amount owed by them became sufficiently liquidated and made certain. Cf. ***St. Louis Testing Laboratories Inc.*** v. *Mississippi Val. Structural Steel Co.*, 254 F. Supp. 47 (D.C. Mo., 1966), aff'd 375 F. 2d 565 (C.A. 8, 1967). They were thereupon placed in a position where serious steps should have been taken either to contest the bill or to verify its accuracy. However, the Defendants completely failed to challenge the bill's sufficiency, much less to acknowledge it or demonstrate any interest in satisfying their obligation.

Defendants' belated attempt to hold the Plaintiffs accountable for not proceeding against the FMC bond smacks of an afterthought. We agree with the Plaintiff that it was not required to forego its action against the principal and its Protection and Indemnity carrier to go against the bond posted with the Federal Maritime Commission. In its role as bond underwriter, the West of England never attempted to open payment negotiations with the United States. Undoubtedly, the United States had the right not to desist from its claim against the insured, specially since, as the Defendants themselves concede, they could have been entitled to deny liability under said certificate of insurance.

Defendants correctly argue that delay on the part of an injured party to press his claim to conclusion is a factor which may prevent recovery of prejudgment interest. See, *San Juan Trading Co* v. *The Marmex*, supra, at 20 (D.C. P.R., 1952); *Mid American Transportation* v. *Rose Barge Line*, 477 F. 2d 914 (C.A. 8, 1973). But this general principle is not applicable to this litigation. The contention that

the United States was derelict in prosecuting the instant action by failing to oppose consolidation does not convince us of the contrary. Suffice it to say that this curious proposition presents to this Court the untenable alternative of chastising a party for not requesting the severance of adequately consolidated actions. We refuse to so act, specially when the Defendants themselves did not oppose the consolidation.[48]

The foregoing considerations convince us that the United States is entitled to prejudgment interest. In determining the starting date for its computation, we are mindful that the general rule in admiralty favors the award of interest from the date of the loss or casualty. See *Moore McCormack Lines, Inc.* v. *Amirault*, 202 F. 2d 893, 898 (C.A. 1, 1953); *Geotechnical Corp. of Delaware* v. *Pure Oil Co.*, 214 F. 2d 476, 477-478 (C.A. 5, 1954); *Alcoa S.S. Co.* v. *Charles Ferrna & Co.*, 443 F. 2d 250, 256 (C.A. 5, 1971), cert. den., 404 U.S. 854 (1971). But this general rule is of course subject to exceptions, giving regard to the particular circumstances presented by each case and in accordance with the Court's discretionary powers. e.g., *Aegean (Shipbrokers') Limited* v. *Henriksen's Rederi A/S*, 165 F. Supp. 939 (D.C. Mass., 1958).

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48. The Defendants rely on a letter by the former Executive Director of the Commonwealth's Environmental Quality Board (Defendants' Exh. 44) as supportive of the view that the reason why the Government "hesitated in bringing its case on for trial" was that the United States was in effect financing the Commonwealth's case. That letter evinces a grant by the Federal Environmental Protection Agency in the amount of $162,732, assigned for "the legal pursuit of redress for damages to the environment that were caused by the dumping of oil from the . . . COLOCOTRONI."

In our opinion, that budgetary assignment by E.P.A. cannot be characterized as champerty and maintenance of the Commonwealth's suit on the part of the United States, insofar as it was in harmony with the Congressional policy "to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction and elimination of pollution." 33 U.S.C. 1251(b).

The instant action cannot be blindly encased in the confines of a typical admiralty claim. Prior to the date when the Government first sent a bill, the claims were unliquidated and unascertained. We think that an award of interest from the date of liquidation adequately satisfies the compensatory policy set forth in 33 U.S.C. 1321(f)(1).

Considering all the equities involved, the United States is hereby awarded a six percent (6%)[49] interest from November 12, 1974, date of the initial invoice[50] to April 8, 1978.[51]

The aspect of statutory penalties

The Federal Water Pollution Control Act, at 33 U.S.C. 1321(b)(3) provides in its pertinent part:

> "The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the **waters of the contiguous zone . . . is prohibited**" . . . In turn, 33 U.S.C. 1321(b)(6) reads in part:
>
> "Any owner, operator, or person in charge of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this **subsection . . . *shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense.***" (Emphasis added).

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49. The United States, albeit it prays for an award of 8%, acknowledges that it knows of no case awarding a rate in excess of that allowed by the State where the Court sits. The rate of six percent established in 31 L.P.R.A. 4591, 3021 will not be exceeded.

50. Cf. *Van Nievelt Goudriaan Co.'s Stoom M.* v. *Cargo & T. Mann. Corp.*, 421 F. 2d 1183 (C.A. 2, 1970); *Wahl* v. *Carrier Mfg. Co., Inc*, 511 F. 2d 209 (C.A. 7, 1975); *Carter Products, Inc.* v. *Cogate-Palmolive Co.*, 214 F. Supp. 383 (D.C. Md., 1963); *Aegean (Shipbrokers') Limited*, v. *Henriksen's Rederi A/S*, supra.

51. This includes the requested interest for five months after our granting of Defendants' Motion for Summary Judgment, as clearly authorized by 28 U.S.C. 1961.

The principal purpose of this Section is the deterrence of harmful oil spills. *United States* v. *Atlantic Richfield Co.*, 429 F. Supp. 830 (E.D.Pa., 1977). The statute clearly places the assessment power on the Coast Guard. Because the Coast Guard is charged with the execution of the statutory scheme, great weight must be accorded to its determination. *United States* v. *W.B. Enterprises*, 378 F. Supp. 420 (D.C.N.Y., 1974).

The parties hereto have stipulated that a maximum penalty of $5,000 was duly assessed by the Coast Guard (Tr. pp. 733-734). The only aspect which was left open to argument was whether or not said penalty should be enforced in this case. (Tr. p. 740).

The Defendants have acknowledged that penalties may be appropriately assessed under 33 U.S.C. 1321(b)(6). They further recognize that in this regard they are legally responsible for the acts of the Master of the COLOCOTRONI. Under these circumstances, and considering the factors surrounding the oil spill in this case, we cannot say that the Coast Guard's decision was either arbitrary or capricious. We are thus duty-bound to sustain the assessment of the maximum penalty. *Matter of Vest Transp. Co., Inc.*, 434 F. Supp. 748 (D.C. Miss., 1977); *United States* v. *Atlantic Richfield Co.*, supra. Therefore, the same shall be enforced against the Defendants. Plaintiffs are hereby awarded a $5,000 penalty under the Federal Water Pollution Control Act.

We shall now turn to the aspect of the penalties requested by the United States under the provisions of the Rivers and Harbors Act of 1899, 33 U.S.C. 401 et seq., Section 13 of the Act, 33 U.S.C. 407, provides, as is herein pertinent:

> "It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged or deposited either from or out of any ship, barge, or other floating craft of any kind . . .

> any refuse matter. . . into any navigable water of the United States . . ."

Section 16 of the same Act, 33 U.S.C. 412 reads in part:

> . . . [A]ny boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections 407 . . . of this title shall be liable for the pecuniary penalties specified in Section 411 of this title." . . .

This Act is far reaching in its scope. It prohibits virtually all deposits of foreign matter into the navigable waters, except liquids flowing from streets and sewers. *United States* v. *Kennebee Log Driving Co.*, 491 F. 2d 562 (C.A. 1, 1973), cert. den., 417 U.S. 910 (1974). Clearly, oil is "refuse matter" within the meaning of the Act. *United States* v. *Standard Oil Co.*, 384 U.S. 224 (1966); *United States* v. *Ballard Oil Co. of Hartford*, 195 F. 2d 369 (C.A. 2, 1952).

33 U.S.C. 411 authorizes the imposition of penalties "not exceeding $2,500 nor less than $500." In setting the amount of these statutory penalties, federal courts possess broad discretionary faculties. See, *United States* v. *Anaconda Wire & Cable Co.*, 342 F. Supp. 1116 (D.C.N.Y., 1972).

The gross negligence leading to the COLOCOTRONI's discharge of enormous amounts of exceedingly polluting oil, as well as the seriousness and extremely adverse effect of said oil spill are described in detail elsewhere in this opinion. In view of the quasi-strict liability envisaged in the statute[52] and in the absence of any extenuating circumstances, we are of the opinion that the maximum statutory penalty is more than justified.

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52. See *In Re: Scow No. 36*, 144 F. 932 (C.A. 1, 1906); *United States* v. *The Martin*, 198 F. Supp. 171 (D.C. Ill., 1961); aff'd 313 F. 2d 851 (C.A. 7, 1963); *United States* v. *The Terry E. Buchanan*, 138 F. Supp. 754 (D.C.N.Y., 1956); *The Gansfjord*, 25 F. 2d 736 (D.C. La., 1928).

Wherefore, a penalty of $2,500 is hereby imposed against the Defendants and in favor of the United States, in accordance with the provisions of 33 U.S.C. 407, 411.

The United States prayer for attorneys' fees

The Government contends that Defendants' obstinacy merits an award of attorneys' fees pursuant to the Puerto Rico Rules of Civil Procedure, 32 L.P.R.A. App. IIR. 44.4(d). This rule provides:

> "Where a party has been obstinate, the court shall in its judgment impose on such person the payment of a sum for attorney's fees."

Our threshold inquiry is whether the quoted rule can lend support to the Government's request in the present action. In this context, it is pertinent to refer to the language of 28 U.S.C. 2412, as amended by Act of July 18, 1966, Pub. L. 89-507, which provides in part:

> "*Except as otherwise specifically provided by statute,* a judgment for costs, . . . *but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States* . . . in any court having jurisdiction of such action." (Emphasis added).

The purpose of this Congressional enactment was to correct inequities in the assessment of costs in civil actions between the United States and private litigants, so that both parties would stand on an equal footing. *Moore* v. *Winfield City Board of Education,* 452 F. 2d 726 (C.A. 5, 1971). On its face it precludes us from entering an award of counsel fees not only against the United States but also in its favor,

absent an independent statutory authorization. See 10 Wright Miller, *Federal Practice and Procedure,* §2672, p. 170 (1973).[53]

This is an action brought by the United States for the recovery of the costs and expenses incurred in removing the oil from the COLOCOTRONI's casualty. The Government's claims for relief are asserted under the Federal Water Pollution Control Act, 33 U.S.C. 1321 (f)(1) and the Rivers and Harbors Act, 33 U.S.C. 401 et seq. None of the allegations in the Complaint are based on a local statute or rule. It is thus clear to us that in the present case the right to recover attorneys' fees is a matter of federal and not of state law. Cf. *J. E. Robertson Co.* v. *United States,* 437 F. 2d 1360 (Ct. Cl. 1971).

The Puerto Rican provision for attorneys' fees has been recognized in this Circuit. See, *Pan American World Airways, Inc.* v. *Ramos,* 357 F. 2d 341 (1st Cir., 1966). But the rationale for this recognition is found in the well settled doctrine that commands application of state substantive law in diversity cases. *Ibid.; Guaranty Trust Co.* v. *York,* 326 U.S. 99 (1945); *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541 (1949). Hence, resort to Rule 44.4 is only justified where diversity of citizenship is one of the components of the cause. See, *Rivera* v. *Rederi A/B Nordstjernan,* 456 F. 2d 970 (C.A. 1, 1972); *City Bank of Honolulu* v. *Rivera Davila,* 438 F. 2d 367 (C.A. 1, 1971); *Carrillo* v. *Westbulk.* 385 F. Supp. 119, 126 (D.C.P.R., 1975); *De Thomas* v. *Delta S.S. Lines, Inc.,* 58 F.R.D. 335, 344 (D.C.P.R., 1973); also see, *Alyeska Pipeline Co.* v. *Wilder-*

53. This is in harmony with the prevailing "American rule", that goes against the award of counsel fees in the absence of a statute or enforceable contract. *F.D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.,* 417 U.S. 116, 126-131 (1974); Fleischman *Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 717-718 (1967).

ness Society, 421 U.S. 240, n. 31 (1975).[54] Such is clearly not the case here.

Also lacking is any federal statutory authority for an award of attorneys fees in this case. The citizen suits' provision of the FederalWater Pollution Control Act, 33 U.S.C. 1365(d) reads:

> "The court, in issuing any final order *in any action brought pursuant to this section,* may award costs of litigation (including reasonable attorney[s] . . . fees) to any party, whenever the court determines such award is appropriate."

Congress clearly circumscribed its allowance of attorneys' fees under the Act to citizens suits brought under 33 U.S.C. 1365. This is of course understandable as a reiteration of the Congressional goal of encouraging private litigation directed to implement public policy. *Alyeska Pipeline Co.* v. *Wilderness Society,* supra, at 263. As the Supreme Court clearly stated in the cited case:

> . . . "[T]he circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." 421 U.S. at 262.

The United States' prayer for attorneys' fees is denied on the aforementioned grounds.

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54. The award of attorneys' fees in maritime non-diversity actions is premised on the inherent equity faculties with which courts have been traditionally invested. e.g., *Vaughan* v. *Atkinson,* 369 U.S. 527 (1962). Thus, any resort to the Commonwealth's rule in those cases, although technically questionable, would achieve a result not inconsistent with this equitable exception. See *Santiago Martínez* v. *Compagnie Generale Trasatlantique,* 517 F. 2d 371 (C.A. 1, 1975). However Courts are deprived of those faculties where, as here, counsel fees are forbidden by Congress. *Alyeska Pipeline Co.* v. *Wilderness Society,* supra, at 259.

Considering the above, the Clerk is ordered to enter Judgment as follows:

1. In Case Number 252-73 for Plaintiffs against Defendants in the amount of $6,164,192.09. with costs.

2. In Case Number 309-73 for Plaintiff against Defendants for interest at 6% on $677,660.42 commencing November 12, 1974 through April 8, 1978, and civil penalties in the amount of $7,500.

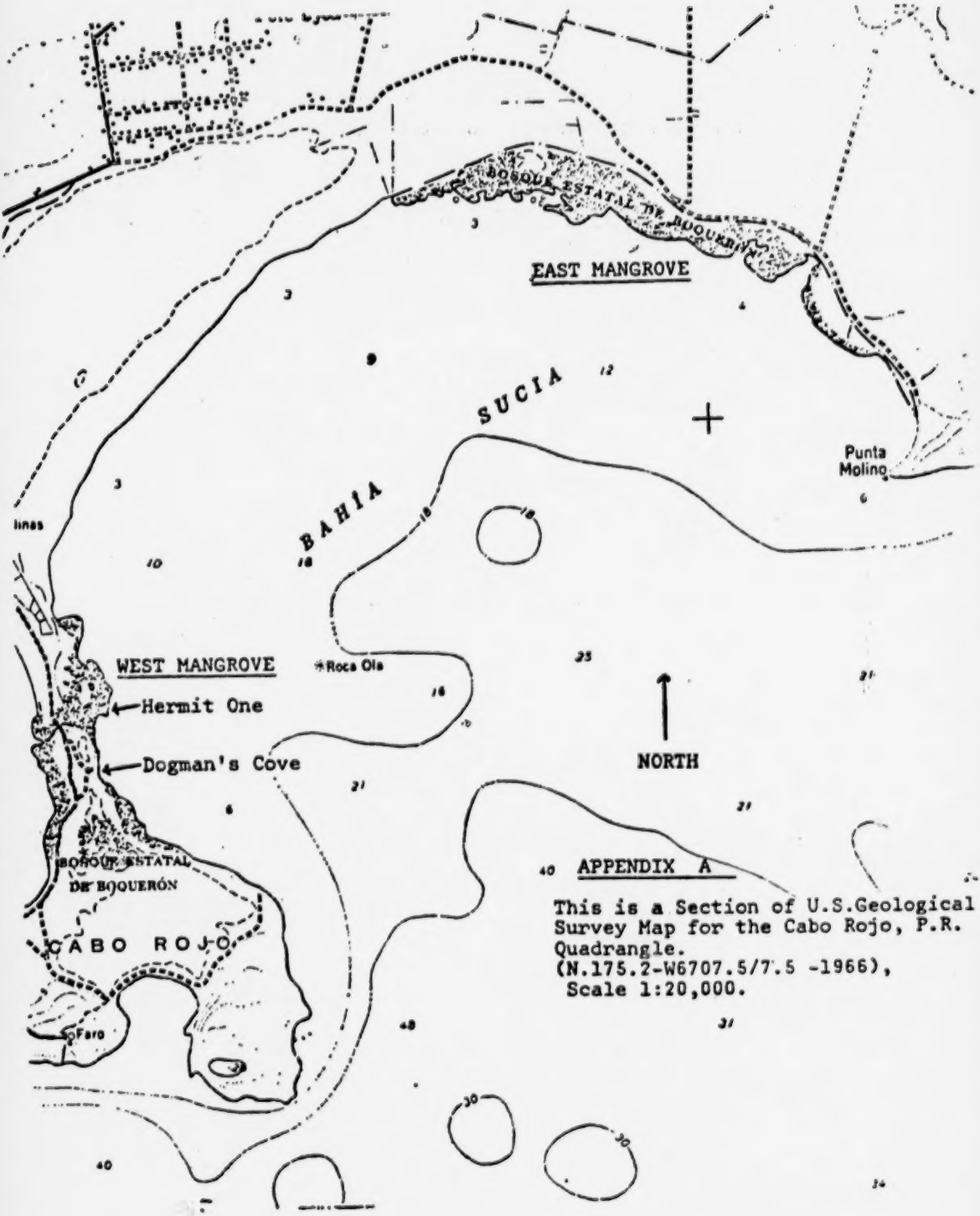
IT IS SO ORDERED.

In San Juan, Puerto Rico, this 15th day of August, 1978.

/s/ JUAN R. TORRUELLA

Juan R. Torruella
U. S. District Court Judge

As amended *nunc pro tunc* by Order filed October 4, 1978.



APPENDIX A

This is a Section of U.S.Geological Survey Map for the Cabo Rojo, P.R. Quadrangle.
(N.175.2-W6707.5/7.5 -1966),
Scale 1:20,000.

UNITED STATES DISTRICT COURT

DISTRICT OF PUERTO RICO

CIV. NOS. 252-73, 268-73, 289-73, 309-73, 985-73 AND 303-74

COMMONWEALTH OF PUERTO RICO, *et al.*,
Plaintiffs,

v.

THE SS ZOE COLOCOTRONI,
etc., *et al.*,
Defendants.

COMMONWEALTH OIL REFINING CO.,
Plaintiff,

v.

STEAM OR MOTOR SHIP ZOE COLOCOTRONI,
Defendant.

MARBONANZA COMPAÑIA NAVIERA, S.A., etc.,
PLAINTIFF, OWNER OF THE S.T. ZOE COLOCOTRONI,
in an action for exoneration from or limitation of liability.

UNITED STATES OF AMERICA

v.

M/V ZOE COLOCOTRONI, etc., *et al.*,
Defendants.

RUBEN CARO, INC.,

Plaintiff,

v.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, *et al.*,

Defendants.

JORGE ACOUSTA LOPEZ, *et al.*,

Plaintiffs,

v.

MARBONANZA COMPAÑIA NAVIERA, S.A., *et al.*,

Defendants.

OPINION AND ORDER

This cause came to be heard upon a Motion filed by Plaintiffs in Civil Number 252-73 requesting the imposition of sanctions against Defendants in view of their failure to comply with various pretrial orders of the Court. A letter motion to the same effect has been submitted by the United States of America, Plaintiff in Civil Number 309-73. After hearing the arguments of counsel, and upon review of the record in these cases and the U.S. Magistrate's Report and Recommendation, dated October 20, 1977,[1] the Court makes the following findings and conclusions.

At a Status Conference held on June 7, 1977 it was agreed that all pending discovery in these cases was to be completed by August 1, 1977. Depositions of Defendants were set for July 5, 6 and 7, 1977. Adequate notices to take depositions were served on June 13, 1977. On July

1. Said Report contains a thorough exposition of the relevant incidents leading to Plaintiffs' Motions.

5, 1977 the Defendants, without any prior notice, failed to appear for the taking of the scheduled depositions.[2] On that same date, upon an immediate request by Plaintiffs, the Court held an in chambers conference where counsel for Defendants stated that his clients were only willing to be deposed in England during the month of August, 1977. It is pertinent to point out that the timetable in effect at that stage of the proceedings contemplated the termination of *all* pending discovery by August 1, 1977.

In view of Defendants' failure to comply with their discovery obligations the Court, on July 29, 1977 granted Plaintiffs' Motions for sanctions and ordered the Defendants to pay costs and attorneys fees.

After several incidents, which are exhaustively summarized by the U.S. Magistrate in his report of October 20, 1977, the pending depositions were again scheduled for August 17, 18 and 19, 1977.[3] Defendants were served with appropriate notices on August 10, 1977.

Another Status Conference was held on August 17, 1977, wherein the Court was informed by counsel Francisco Bruno that Defendants did not appear at the depositions scheduled for that same date due to the fact that Defendants were admitting liability. No restrictions on that admission appear to have been then suggested by Attorney Bruno.[4] The Court thus ordered counsel for Defendants to file a written admission of liability within 15 days. In view of the admission announced by Attorney Bruno, the

2. Clearly, by failing to give reasonable notice of their inability to comply with the notices of taking of depositions, Defendants willfully violated their duty to make discovery. See, *Marriott Homes, Inc.* v. *Hanson,* 50 F.R.D. 396 (D.C.Mo. 1970).

3. The change was approved by the Court on August 15, 1977.

4. Indeed, at the hearing of October 20, 1977, Attorney Santiago Villalonga acknowledged that he had assured Plaintiffs that, in view of Defendants' admission of liability, there was no need to take the depositions of Defendants.

Court indicated that the trial on damages was to begin on November 7, as scheduled on June 7, 1977.

Notwithstanding the clear terms of that Order, and in spite of Defendants' previous representations to the Court and to Plaintiffs, the Defendants neither filed any admission of liability within the term prescribed by the Court nor did they indicate why they were not doing so.

Thereafter, at a Some Disposition Conference held on October 7, 1977 the Court, upon hearing the statements of Attorney Santiago Villalonga, again ordered Defendants' counsel to file a Motion conceding liability on behalf of all Defendants by October 14, 1977. It was specified that should any of the Defendants fail to admit liability on that date, all the Defendants were to appear on October 17, 1977 for the taking of their depositions by Plaintiffs. The Court further ordered in no uncertain terms, that any Defendant that failed to appear for the depositions would be sanctioned by striking its defenses and allegations.

Defendants again violated the two-fold Order of the Court when they failed to admit liability on October 14, 1977 and at the same time stated that they would not be able to appear for the depositions of October 17, 1977.[5] Plaintiffs then proceeded to move the Court for the imposition of sanctions.

Against the backdrop of the events summarized above, we will proceed to examine the legal factors that should be considered for the proper disposition of the present matter.

Rule 37 of the F.R.Civ.P. empowers district courts to make such orders as "are just" when a party fails to comply with a discovery order. This rule, as well as discovery

5. It should be noted that, by their conduct, the Defendants were also disregarding our previous admonishment to the effect that no further alterations in the established schedules would be permitted. In their motion of October 14, 1977 Defendants requested, *inter alia*, the continuance of the pretrial conference set for October 25, 1977. Moreover, Defendants' request for the postponement of the depositions obviated the unequivocal terms of our Order of July 13, 1977.

rules in general, is to be construed liberally in favor of the party seeking discovery. *Marshall* v. *Electric Hose & Rubber Co.*, 68 F.R.D. 287 (D.C. Del. 1975). In this context, the choice of means for dealing with a party's noncompliance with orders of discovery lies within the Court's discretion, *Atlantic Cape Fisheries* v. *Hartford Fire Ins. Co.*, 509 F. 2d. 577 (C.A. 1, 1975), which should be exercised to secure the just, speedy and inexpensive disposition of actions. *Babcock & Wilcox Co.* v. *North Carolina Pulp Co.*, 25 F. Supp. 596 (D.C. Del., 1938).

When the conduct of Defendants herein is evaluated in its entirety, it can only be concluded that they have demonstrated bad faith and a callous disregard of their responsibilities in this litigation. The claims presented in these cases have been pending for more than four years and this is not the first time that Defendants and their counsel have demonstrated a willful disregard of reasonable and necessary court orders and of the efficient administration of justice. (See our Order of November 10, 1975).

Specifically, during the four months preceding the trial date set in these cases, the Defendants have displayed a course of conduct which has placed the Plaintiffs and the Court in a difficult position to effectuate the prompt termination of pretrial incidents. This type of vexations conduct cannot be tolerated by the Court. cf. *Atlantic Cape Fisheries* v. *Hartford Fire Ins. Co.*, supra.; *Eduardo Zavala Santiago* v. *Alfredo González Rivera, et al.*, 553 F.2d. 710 (C.A. 1, April 21, 1977). The representations made by Defendants' counsel regarding their clients' admission of liability, as well as Defendants' ill-timed maneuvers in repeated disregard of clear orders of the Court, not only constitute an affront to this Court's dignity, but have also caused prejudice to Plaintiff's preparation of their case by leading them to cancel scheduled

depositions, only to recant their prior admissions just three weeks ahead of trial.

This Court is duty-bound to protect the parties from unfair surprise and prejudice. *Duncan* v. *Lord*, 409 F. Supp. 687 (D.C. Pa., 1976). Under the peculiar exigencies of the situation, we would be obviating that duty if we were to condone Defendants' actions.

In view of the foregoing, and after a careful balancing of the various factors involved, the Court deems that the interests of justice will be better served by granting Plaintiffs' Motion of October 17, 1977. Accordingly, Defendants' allegations and defenses as to exoneration from and limitation of liability are hereby stricken. Defendants will be precluded from presenting any evidence whatsoever at trial regarding those defenses. See, *Local Union No. 251* v. *Town Line Sand & Gravel, Inc.*, 511 F. 2d 1198 (C.A. 1, 1975); *Emerick* v. *Fenick Industries, Inc.*, 539 F. 2d 1379 (C.A. 5, 1976); *Metropolitan Greetings, Inc.* v. *McDonough, Inc.*, 60 F.R.D. 58 (D.C. Pa. 1973); *Merit Finance Co., Inc.* v. *Service Finance Co. Inc.*, 38 F.R.D. 482 (D.C.S.C., 1965).

The parties are further advised that, at previously scheduled, the trial on damages will commence on *November 7, 1977 at 9:00 A.M.*

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 21st day of October, 1977.

/s/ JUAN R. TORRUELLA

Juan R. Torruella
U.S. District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civ. Nos. 252-73, 268-73, 289-73, 309-73, 985-73 and 303-74

COMMONWEALTH OF PUERTO RICO, *et al.*,
Plaintiffs,

v.

THE SS ZOE COLOCOTRONI,
etc. *et al.*,
Defendants.

COMMONWEALTH OIL REFINING CO.,
Plaintiff,

v.

STEAM OR MOTOR SHIP ZOE COLOCOTRONI,
Defendant.

MARBONANZA COMPAÑIA NAVIERA, S.A., etc.,
PLAINTIFF, OWNER OF THE S.T. ZOE COLOCOTRONI,
in an action for exoneration from or limitation of liability.

UNITED STATES OF AMERICA

v.

M/V ZOE COLOCOTRONI, etc., *et al.*,
Defendants.

RUBEN CARO, INC.,

Plaintiff,

v.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, *et al.*,

Defendants.

JORGE ACOUSTA LOPEZ, *et al.*,

Plaintiffs,

v.

MARBONANZA COMPAÑIA NAVIERA, S.A., *et al.*,

Defendants.

OPINION AND ORDER

The above captioned cases were consolidated for all future action herein by Order of this Court dated September 23, 1975. The issues of liability and damages were bifurcated for purposes of trial.

This matter is before the Court on Motions of several parties. The Court will first consider the Motion to Quash Service of Process filed on June 18, 1973 in Civil Number 252-73. Simultaneously, we will consider *en gros* similar Motions made by West,[1] on August 18, 1974 in Civil Number 303-74, on March 14, and July 26, 1974 in Civil Number 268-73, and on January 21, and March 15, 1974 in Civil Number 985-73.

These cases are the product of an oil spillage which occurred approximately three and one half years ago which allegedly caused damage within the navigable waters of the Commonwealth of Puerto Rico. Plaintiffs brought an ac-

1. There are two insurance clubs in these cases with identical names save suffixes which are (London) and (Ltd. Luxembourg).

tion in rem against the vessel M/V Zoe Colocotroni, and in personam against Colocotroni, Ltd. Colocotroni Bros., S.A., and Marbonanza Compañía Naviera, S.A., as well as against the hull protection and indemnity underwriters (at the time unknown), West of England Ship Owners Mutual Protection and Indemnity Association (Ltd. Luxembourg). Subsequently West (London) was also added as party Defendant.

The question to be decided by us is the validity of the service of process for purposes of acquiring in personam jurisdiction over either or both Wests.

In its Motion to Quash Service, West (Luxembourg) is represented by the law firm of Hartell, Ydrach, Mellado, Santiago, Pérez & Novas An affidavit accompanying the Motion verifies the attorney-client relationship that exists with West (Luxembourg) and a Memorandum of Law cites Rule 4(d)(3), Federal Rules of Civil Procedure in support of its contention. That Section of Rule 4 reads as follows:

> "(d) Summons: Personal Service. The summons and complaint shall be served together. The Plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
>
> (1) . . .
>
> (2) . . .
>
> (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the

statute so requires, by also mailing a copy to the defendant."

Plaintiff on January 30, 1976 submitted for consideration of the Court an extensive Memorandum on the jurisdictional issue affecting the service of process pursuant to Rule 4(d)(3) Federal Rules of Civil Procedure and Rule 4.7 Puerto Rico Rules of Civil Procedure. After its perusal and considering Defendants' original Motion to Quash, the Court, on May 11, 1976 issued an Order which, in part, reads:

> "Defendants are granted a final period of ten days within which to answer Plaintiffs' argument. Otherwise, the Motions to Quash and to Dismiss of the Defendants will be denied, following our reasoning in *Ayala Cantrés, et al.* v. *Campagnie Generale Transatlantique et al.*, Civil Number 410-73, decided January 7, 1975."

In reply, Codefendant West (Luxembourg), submitted a supplemental Memorandum in support of its Motion to Quash Service of Process filed over three years ago. They aver that the substitute service of process made in the instant case is an attempt of Plaintiff to comply with the provisions of Rules 4(e), and 4.7, Federal Rules of Civil Procedure and Puerto Rico Rules of Civil Procedure respectively, and are thus insufficient and improper.

Rule 4(e) reads thus:

> "Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the man-

> ner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him, to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule."

The constitutionality of long arm statutes and the result of service of process as prescribed thereby were expanded by the holding of the United States Supreme Court in *International Shoe Co.* v. *State of Washington,* 326 U.S. 310 (1945) in which the following test was promulgated:

> "A foreign defendant is amenable to suit if it has 'certain minimum contacts' with (the forum) such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice." Id. at 316. (See also *Perkins* v. *Benquet Consolidated Mining Co.,* 342 U.S. 437 (1952)).

Twelve years later, the same Court held also in a much cited case, that an isolated contact with the forum is sufficient to support jurisdiction because of the casual relation to the claim in question. *McGee* v. *International Life Insurance Co.,* 355 U.S. 220 (1957). The minimum contacts test at present encompasses the notion that ". . . it (be) essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the Forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla,* 357 U.S. 235, at 253.

Defendants' original Motion to Quash Service of Summons was based upon the allegation that there is no relationship of agency between Hartzell and West (Luxembourg).

There is before the Court a voluminous mass of documents which, among others, establishes a nexus between Hartzell and West, insurer of the vessel or of its owners. Although the degree and character of Hartzell's work may be under attack as functions of agency, the Court is reluctant to find such a portent in said relationship, at least for purposes of service upon a principal. Plaintiff avers that *United States* v. *SS Ocean Eagle,* 47 F.R.D. 519 (DCPR, 1969), is controlling. Yet, in that case the entity upon which service was made was William Munch, Inc., appointed by London Steamship Owners' Mutual Insurance Association Ltd. as cargo surveyor and marine claims settling agent. In the present case, the activity of Hartzell as a law firm specializing in, among other fields, admiralty and maritime law can hardly be discounted. See V. Martindale-Hubbell Law Directory 20B (1975 ed.). The intensity with which an attorney protects the right of his clients (see e.g. *Commonwealth of Puerto Rico* v. *Zoe Colocotroni,* 61 F. R.D. 653 (DCPR, 1974)) cannot in itself change the relationship from one of attorney-client to one of principal-agent. Also, it is substantially settled that a law firm or attorney cannot, without precise designation receive summons for purposes of obtaining jurisdiction over a client. *Schultz* v. *Schultz,* 436 F. 2d 635 (C.A. 7, 1971); *Baskin Monteiro* v. *Montedonico,* 26 F. Supp. 849 (D.C. Tenn., 1938), aff'd 115 F. 2d 837 (CA 6, 1939).

We find no authorization given to Hartzell to accept service of process on behalf of West. Furthermore, the acceptance of the summons does not constitute a waiver of defects in the court's jurisdiction. See *Christensson* v. *Hogdal,* 199 F. 2d 402 (C.A.D.C., 1952), p. 404, n.3.

2 Moore's Federal Practice (2d ed.) Sec. 4.12 states:

> "The phrase 'an agent authorized by appointment to receive service of process' is intended to cover the situation where an individual actually appoints an agent for that purpose." Cited in *Schultz* v. *Schultz,* supra.

Only where an attorney is expressly or impliedly authorized to accept service of process can his doing so bind his client and subject him to jurisdiction of the local court." *Christensson,* supra. See *United States Maple Community Record, Inc.* 335 F. Supp. 95, 101 (E.D. Pa., 1971).

Although Plaintiff has attempted to construct an agency relationship upon a foundation of conclusions, the Court finds that Plaintiff's proof has not reached the plateau at which a managing or general agent would be proven to operate. In reaching this conclusion, we are aware that Hartzell, as attorneys, appears in a list of correspondents given to club members and that West has on many occasions requested Hartzell to appoint agents and to protect its interests as it sees fit. Although acts referred to in Plaintiff's brief were no doubt acts of agency, they were substantially intertwined with Hartzell's primary professional functions to diminish their portent.

Post hac, we find nothing in the attorney-client relationship in question which convinces us that an agency agreement for the purposes of service of summons existed between Hartzell and West. We must also keep in mind that, unlike a general agency relationship, that of attorney-client is *sui generis,* the privileges of which are protected by law, and the violation of which is severly punished.

However, the product of Plaintiff's discovery does convince the Court that West had and has sufficient minimum contacts with this forum for purposes of finding *in personam* jurisdiction over its person. The frequency of

the contacts, their nature, and the continuous representation of West by Hartzell, their retained law firm, establishes sufficient elements of proximity to the forum and degree of "business transactions" to obviate any shock to the conscience in determining that the 'minimum contacts' test has been met by West.

First, the Court notes that the incident of impact and the jettison of oil (roughly 30,000 gallons) occurring 3.2 miles from the West Coast of Puerto Rico, that is, within the special admiralty jurisdiction of the United States, the result of which is a contamination of territorial waters and damage to insular riparian property constitutes sufficient "minimum contact" with the jurisdiction so that ". . . traditional notions of fair play and substantial justice". . . are not violated. Secondly, the principal object of West (Luxembourg) appears to be to effect and carry out contracts of insurance upon ships or in connection with damage arising out of or in connection with the use of ships. Thus, it seems apparent that an insurance policy issued in favor of a vessel follows the vessel wherever it sails for purposes of responsibility of the insuror within the limits of the policy. To decide otherwise would be to discount any practical value of such a policy and would leave a damaged Plaintiff with little or no redress against an undercapitalized principal which could, as a result of negligent action, cause untold damage with relative impunity. As was stated in *Ayala Cantres* v. *Campagnie General Transatlantique,* Civil Number 410-73, decided January 7, 1975,

> ". . . Puerto Rico has a legitimate interest in safeguarding the rights of persons injured within its jurisdiction and that its statutory provisions allowing direct action against insurers, even when they do not engage in business within Puerto Rico and their policies have been solicited, issued and delivered without Puerto Rico, are constitutional and a

> proper exercise of its governmental powers. *Watson* v. *Employers Liability Assurance Corp.*, 348 U.S. 66 (1954); *Pugh* v. *Oklahoma Farm Bureau Mutual Insurance Co.*, supra."

As Codefendant ably notes in the supplemental memorandum, "It is the quality and nature of the activity rather than mechanical tests that are controlling in determining whether the 'minimum contacts' tests of due process has been met. *Doyle* v. *Payne,* 326 F. 2d 941 (CA 5, 1964)." The quality and nature of West's contacts have been sufficient to meet the standards set forth in *McGee* v. *International Life Insurance Co.* supra.

Therefore, for the above reasons, the Motions to Quash Service of Summons served pursuant to Rule 4(d)(3), Federal Rules of Civil Procedure are granted as to the service upon West through their attorney. Otherwise, the Motions to Quash Service pursuant to Rule 4(e), Federal Rules of Civil Procedure and 4.7 Puerto Rico Rules of Civil Procedure because of lack of *in personam* jurisdiction over West are denied.

In Civil Number 268-73, *Commonwealth Oil Refining Company, Inc.* v. *Steam or Motor Boat Zoe Colocotroni, etc.,* et al., the Motion to Quash Service of Process filed by Hartzell on March 14, 1974 is granted. The Motion to Quash filed by West (London) on July 26, 1974 based upon the nullity of service of process according to Rule 4.3 of the Rules of Civil Procedure of 1958 for the Commonwealth of Puerto Rico and upon the lack of *in personam* jurisdiction over West (London) is hereby denied. Plaintiff's Motion, filed on August 30, 1974, that the Motion to Quash be decided on the basis of the evidence submitted in Civil Number 252-73 is moot.

The request to enter default filed by Plaintiff on July 19, 1974 is denied because there appears that there is no entity entitled West of England Steamship Owners Protection

and Indemnity Association, Limited, over which this Court has jurisdiction. Subsequently, in February 26, 1976 Plaintiff has requested the Clerk of this Court to enter default of West (Luxembourg). In view of the consolidation of these cases, Defendant West (Luxembourg) is granted a final period of thirty (30) days to plead or otherwise appear in this case. The Clerk of the Court is instructed to enter default at the expiration of thirty (30) days from the filing of this Order, unless Defendant West (Luxembourg) answers the Complaint or otherwise pleads.

The Motion to Quash in Civil Number 74-303, filed by Hartzell on August 8, 1974 is hereby granted. The Motion for Consolidation filed by Plaintiff on August 21, 1974 is moot. Therefore, service made upon the firm of Hartzell effectuated on May 30, 1974 upon attorney José L. Novas Dueño is hereby quashed.

In Civil Number 985-73, Hartzell's Motion filed January 21, 1974 to quash service of process is incorrectly served upon a member of its firm for purposes of acquiring jurisdiction over West (Luxembourg) is granted. The Motion to Quash Service of Summons of West (London) and West (Luxembourg) filed on March 21, 1974 are denied.

In Civil Number 252-73, the Motion to Quash Service of Process filed on June 18, 1973 is granted. Summons served upon Vicente M. Ydrach, Esq., on April 19, 1973 is hereby quashed.

These cases are hereby referred to the U. S. Magistrate for the establishment of a time table that will enable these cases to be tried commencing on August 1, 1977 at 9:00 A.M.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 14th day of January, 1977.

/s/ JUAN R. TORRUELLA

Juan R. Torruella
U. S. District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civ. No. 252-73

COMMONWEALTH OF PUERTO RICO *et al.*,

Plaintiffs,

v.

THE SS ZOE COLOCOTRONI, *etc., et al.*,

Defendants.

ORDER

A hearing was held in the above-captioned matter on November 7, 1975, on plaintiffs' motion dated October 23, 1975. All parties were present represented by their attorneys and after hearing arguments by their respective attorneys, the Court

ORDERS Vicente M. Ydrach, the law firm of Hartzell, Ydrach, Mellado, Santiago, Perez & Novas, Marbonanza Compañia, S.A. and The West of England Ship Owners Mutual Protection and Indemnity Association to comply with the Order of this Court entered September 17, 1975.

Failure to comply with that Order within 10 days will lead to the following consequences. All pleadings and all defenses of the defendants shall be stricken from the record and all motions of the defendants shall be denied and judgment by default shall be entered. Furthermore, after the 10 day period elapses there will be a $100.00 per day fine for every day in which the Order is not complied with and this fine will be jointly and severally against all the parties to which this Order is directed.

IT IS FURTHER ORDERED that the matter of attorneys' fees and costs prayed for in the plaintiff's motion for sanctions will be held in abeyance until such time as the court may determine whether this Order is complied with. Taking into account the case of *Maness* v. *Meyers,* 419 U.S. 449, 42 L.Ed. 574, 95 S.Ct. 584 (1975) cited by the defendants, any action to be taken against counsel for the defendants shall be withheld for further disposition by the court.

Defendants are advised that the court will, upon request, certify this matter to the Circuit Court for decision. If the request is not made, however, the court will, upon proper motion, further act as to whether sanctions should be imposed upon defendants' counsel.

Defendants are further advised that, upon request, any part or the entire matter related to this Order may be certified to the Circuit Court for decision.

IT IS SO ORDERED. In San Juan, Puerto Rico, this 7th day of November, 1975.

/s/ JUAN R. TORRUELLA

JUAN R. TORRUELLA
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civ. No. 252-73

COMMONWEALTH OF PUERTO RICO, *et al.*,
Plaintiffs,

v.

THE SS ZOE COLOCOTRONI, *etc., et al.*,
Defendants.

ORDER

Upon due consideration of the Magistrate's Report and Reconsideration filed March 25, 1974, together with the objections filed thereto, and taking into account the Memorandum Opinion of January 31, 1974, the Court hereby adopts the said Report, and

ORDERS the Law Firm of Hartzell, Ydrach, Mellado, Santiago, Pérez & Novas to produce the documents that are ruled discoverable in the said Report. The production shall take place within the next 30 days at such time and place as may be mutually agreed upon with Plaintiffs' counsel. If agreement cannot be reached forthwith, the parties shall seek the aid of the Court in resolving said matter.

Thereafter Plaintiffs are granted 15 days within which to file briefs on the pending jurisdictional issues, and Defendants are granted 15 days within which to file reply briefs. Briefs shall not exceed 15 pages.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 17th day of September, 1975.

/S/ JUAN R. TORRUELLA

U. S. District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civ. 252-73

COMMONWEALTH OF PUERTO RICO, *et al.*,
Plaintiffs,

v.

THE SS ZOE COLOCOTRONI, *etc., et al.*,
Defendants.

ORDER

This cause came to be heard in an ex-parte application filed by the plaintiffs requesting leave to serve summons upon The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg), co-defendant herein, pursuant to Rules 4(e), 4.7 and 10.1 of the Federal Rules of Civil Procedure and the Rules of Civil Procedure of the Commonwealth of Puerto Rico, respectively, basing its petition upon the fact that said defendant, although not domiciled within this district, has carried business activities within the same.

The Court, being duly advised, hereby grants the remedy prayed for in the plaintiffs' motion for leave to serve summons under the above mentioned rules and hereby orders that the defendant will serve its answer to the complaint within forty (40) days after the plaintiff deposits in the United States Mail copies of all the documents on file in

this case, according to the disposition of said rules. Summons will actually be served on the Secretary of State of the Commonwealth of Puerto Rico, as Agent for said defendant.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 11th day of April, 1974.

/s/ HERNAN G. PESQUERA

U.S. District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civ. No. 252-73

COMMONWEALTH OF PUERTO RICO, *et al.*,

Plaintiffs,

v.

THE SS ZOE COLOCOTRONI, *etc., et al.*,

Defendants.

ORDER

This cause came to be heard in an ex-parte application filed by the plaintiff requesting leave to serve summons upon The West of England Ship Owners Mutual Insurance Association (London) Limited, co-defendant herein, pursuant to Rules 4(e), 4.7 and 10.1 of the Federal Rules of Civil Procedure and the Rules of Civil Procedure of the Commonwealth of Puerto Rico, respectively, basing its petition upon the fact that said defendant, although not domiciled within this district, has carried business activities within the same.

The Court, being duly advised, hereby grants the remedy prayed for in plaintiffs' motion for leave to serve summons under the above-mentioned Rules and hereby orders that the defendant will serve its answer to the complaint within forty (40) days after the plaintiffs deposit in the United

States Mail copies of all the documents on file in this case, according to the dispositions of said Rules. Summons will actually be served on the Secretary of State of the Commonwealth of Puerto Rico, as Agent for said defendant.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 8th day of April, 1974.

/s/ HERNAN G. PESQUERA

U.S. District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civ. No. 252-73

COMMONWEALTH OF PUERTO RICO, *et al.*

Plaintiffs,

v.

THE SS ZOE COLOCOTRONI, *etc., et al.,*

Defendants.

MAGISTRATE'S REPORT AND RECOMMENDATION

Upon the referral of then Chief Judge Hiram R. Cancio, and from a study of the documents deposited in court by the Law Firm of Hartzell, Ydrach, Mellado, Santiago, Pérez & Novas, hereinafter "Hartzell", the Magistrate finds as follows:

Introduction

The documents studied consisted of what were represented to be all of Hartzell's files for West of England Ship Owners Mutual Protection and Indemnity Association, hereinafter "West" or "West of England." Of the files submitted, Hartzell has withdrawn, with the court's permission, the files relating to the claims filed upon the sinking of the SS Antilles in Caribbean waters, and several other case files,

specifically those numbered 117-8, 177-7, and 1-70.[1] In addition, there are two other documents with the files which have nothing to do with the issues herein and seem to have been misfiled. There remain in the court's possession at this time then a total of thirty-nine files including file 1-132 with ten subfiles and file 1-240 West of England general correspondence file. In examining the files and determining whether they should be discovered or not the relevancy of the documents to the issues presented and the attorney-client and work product privileges have been considered.

Findings

A—Files considered not discoverable by reason of being closed litigation files containing legal work and trial preparation material which lack relevant information:

FILE NUMBER	NAME	SUBJECT	
179 cl 5	Alfonso Villegas Trinidad	Longshoreman	Civil 415-67
75 cl 114	Agapito Torres Rodríguez	Longshoreman	Civil 302-65
176 cl 67	Reinaldo Ortiz Rivera	Longshoreman	Civil 346-69
178 cl 1	Guillermo Pantoja Molina	Longshoreman	Civil 126-64
177 cl 17	Sebastiana Luyanda Colón	Longshoreman	Civil 639-67
176 cl 57	Luis Pagán Jaime	Longshoreman	Civil 449-68
175 cl 126	Felipe Galíndez Pérez	Longshoreman	Civil 294-64
175 cl 115	Faustino Torres Cruz	Longshoreman	
1 cl 771	Oost Atlantic Lijn	In rem suit (cargo)	Civil 727-67
1 cl 921	Carmen Laura Colton	Passenger accident aboard ship	

B—Same as A but open files:

FILE NUMBER	NAME	SUBJECT	
173-10	Reith & Co. c/o La Morte Burns Edibert Guardiola Pecoelli	Longshoreman	Civil 1021-72
177-17	Juan Vendrell Batistini	Longshoreman	Civil 748-72
179-8	Fabián Delgado Osorio	Longshoreman	Civil 1075-72
179-9	Arcángel Toledo Vargas	Longshoreman	Civil 896-72
1-772	El Monte Corporation	Cargo Claim	Civil 382-73

1. The court has allowed Hartzell to keep files 177-8 and 177-7. The Antilles files and 1-70 are now, for expediency, allowed to remain in Hartzell's possession unless plaintiff requests otherwise.

C—Other files not discoverable:

FILE NUMBER	NAME	SUBJECT	REASON
1 cl 934	C. M. McLean Ltd.	Seizure of vessel	Only attorney's notes and attempts to collect fees, not relevant.
1 cl 103	M/V Christian	Claim Damages to Vessel	Attorney-client privilege, not relevant.

D—FILES RULED DISCOVERABLE

FILE NUMBER	NAME	SUBJECT	STATUS	REASON
1-836	The West of England M/V Anastasia Seaman Accident	Telex to Hartzell with instructions and telex to West reporting compliance re: hospital care of injured seaman	open	1–*No attorney-client privilege.* No purpose of obtaining advice, gives instruction. No legal work. 2–*No work product,* not in anticipation of litigation. Documents are not result of work, but the report of work. Different unrelated case.
1 cl 960	SS Elita Death of crew member	Arrangements for burial of crew member	closed	Same as 1-836 above.
1 cl 294	George Tsaoyssidis	Repatriation of seaman and wage claim Civil Case 678-71	closed	1–*No attorney-client privilege* since there are no communications from client. 2–*No work product.* Unrelated case, closed, and very useful to illustrate relationship between Hartzell and West. Usefulness overcomes interest to be protected by denying discovery.

FILE NUMBER	NAME	SUBJECT	STATUS	REASON
1 cl 808	North Cape	Damaged Meat	closed	1–*No attorney-client privilege.* Did not seek legal advice. Gave instructions and requested information. 2–*No work product.* Unrelated case, closed, and very useful to illustrate relationship between Hartzell and West. Usefulness overcomes interest to be protected by denying discovery.
1 cl 966	M/T Vincenzia Investigation of fine	Defense of immigration claim against ship	closed	1–*No attorney-client privilege.* Not confidential since third parties received information. 2–*No work product.* Prior action closed and not related. This is borderline case and is very useful to illustrate the relationship between Hartzell and West. Its relevance overcomes any remote privilege that might be present.
1 cl 552	Feliciano A. Rolling-Freire	Same as 1 cl 966 above	closed	Same as 1 cl 966 above.

FILE NUMBER	NAME	SUBJECT	STATUS	REASON
1 cl 896	M/V Hera	Damaged cargo	closed	1–*No attorney-client privilege.* Information received from third parties. Letters from West are "thank you" letters and one confirming that vessel was covered. 2–*No work product.* Remote and closed file was amicable adjustment of claim, local agents of ship were the ones that contacted Hartzell as representatives of Underwriters.
1-793	Aegis faith	Damaged cargo	closed	1–*No attorney-client privilege.* No information from client, but from other attorneys. 2–*No work product.* Nothing was done or assembled by Hartzell.
1-729	M/S Manitoba	Damaged cargo	pending	1–*No attorney-client privilege.* No information from client. 2–*No work product.* Third party submitted information to Hartzell unrequested.

FILE NUMBER	NAME	SUBJECT	STATUS	REASON
1 cl 858	Rice Queen	Rice Damaged	closed	1–*No attorney-client privilege.* No communication from client, except "thank you" letter. Information received from third parties. 2–*No work product.* Remote and closed file. Hartzell contacted by Ship's agent for survey for the account of West. Nothing else done and survey prepared by third person. Different unrelated case.
1 cl 179	M/V Melusine	Pre-shipment Survey	closed	1–*No attorney-client privilege.* Information received from other attorneys with instructions to protect. 2–*No work product.* Nothing done. Different unrelated case.
1 cl 61	M/V Susane Reith	Crew refusal to sail vessel	closed	1–*No attorney-client privilege.* Information received from third parties, and instructions from West to assist in situation. 2–*No work product.* Survey ordered to ascertain seaworthiness of ship and reports to West.

FILE NUMBER	NAME	SUBJECT	STATUS	REASON
1 cl 897	SS Hera	Damaged cargo	closed	1–*No attorney-client privilege.* Letters requested survey and investigation of facts did not seek advice. 2–*No work product.* Unrelated case and very relevant to demonstrate relation between Hartzell and West.
1 cl 699	SS Antilles	Damage to pier	closed	1–*No attorney-client privilege.* Client requests information. No advice. 2–*No work product.* Unrelated case. No litigation anticipated. Relevant to illustrate relation between Hartzell and West.
1 cl 455	Thomas Patrick Queeman	Abandoned seaman	closed	1–*No attorney-client privilege.* No request for advice but rather to perform non-legal work. 2–*No work product.* No legal work and unrelated case.
1-240	West General File	Miscellaneous	—	1–*No attorney-client privilege.* 2–*No work product.* This is a miscellaneous file of non-legal work.

E-Mixed files partly discoverable and partly privileged:

1 cl 312-Néstor García

1) The copies of pleadings in case civil 70-7875 before this court need not be produced as irrelevant.

2) Letters to and from Ship Agent's Attorney in relation to the defense of the Agent from a claim are discoverable. They relate to the fact of the representation and are not privileged.

3) Letter from West dated December 15, 1970 authorizing Hartzell to defend Agent is not privileged. It relates to fact of representation.

4) Letter and enclosures from West dated January 14, 1971 are discoverable since they seek information and business advice, not legal work.

5) Cable dated January 21, 1971 to West from Hartzell gives information and business advice, not privileged.

6) Reply cable gives instructions for legal questions. It should be privileged and discovery is not allowed. (Marked 1 cl 312(1))

7) All other documents in the file are work product and are irrelevant.

175 cl 119-Angel Castro Aristud

1) Litigation file for a longshoreman claim civil 592-66 is privileged and irrelevant, except the letter dated February 24, 1966 from the Master of the Vessel reporting an accident to Hartzell. This is not a communication from a client seeking advice, but is an unsolicited accident report ". . . . in order to avoid any consequences or claims . . ." and not privileged.

1 cl 54-Tower Bridge

1) Letter and enclosures dated October 31, 1967 from United Kingdom Mutual Steamship Assurance Association, Ltd., are not privileged since it seeks information not legal advice and United Kingdom has not claimed privilege.

2) Hartzell letter dated November 7, 1967 is not privileged. It gives information, not legal advice.

3) Letter from United Kingdom Mutual Steamship Assurance Association, Ltd., dated November 7, 1967 seeks both business and legal advice. The document's relevancy overcomes privilege. The enclosures are not confidential (sent to third parties). Discovery should be allowed. Note: United Kingdom Mutual Steamship Assurance Association, Ltd., has not requested privilege.

4) Hartzell's letter dated December 1, 1967 gives business advice. Discovery should be allowed, contains no legal work.

5) United Kingdom's letter of December 19, 1967 is privileged but discovery is allowed since United Kingdom has not requested privilege.

6) Hartzell's letter of January 5, 1968 gives legal advice, it is privileged but discovery is allowed since privilege is not claimed.

7) Other documents in the file are work product or attorney-client privilege and should not be discovered since they are irrelevant.

1 cl 902-SS Fort D'Orleans and Antilles

1) Discovery is allowed for this file. No attorney-client privilege. Letter and enclosures come to

Hartzell directly from Compagnie Generale Transatlantique which has not claimed privilege.

2) The West of England only writes to approve settlement. The information is not confidential. No work product since litigation is unrelated and very relevant to show relationship between West and Hartzell.

176-8-Antonio Peña Vázquez

1) Letter from Patmont dated May 5, 1970 and enclosures allowed.

   a) Client doesn't seek advice, gives instructions—copies sent to third parties.

2) The remainder of the file is work product and irrelevant so it is not ordered.

The parties are granted ten days from notice to present objections to this report in writing with a memorandum of law. When filing their objections, counsel must be specific as to the particular documents to which the objections refer and must bear in mind that the Memorandum Opinion of January 31, 1974 is the law of the case.

The case is remanded to the Judge handling it for the setting of a hearing at which time the objections to this report, if any, may be argued and ruled upon. The production may take place, and the propriety and method of sanctions against Defendant may be determined at that same hearing.

Submitted at San Juan, Puerto Rico, on March 21, 1974.

/s/ John M. Garcia

JOHN M. GARCIA
United States Magistrate

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civ. No. 252-73

COMMONWEALTH OF PUERTO RICO, *et al.*,
Plaintiffs,

v.

THE SS ZOE COLOCOTRONI, *etc., et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

Defendant, the West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg) (hereinafter West), has asked this Court to reconsider an order entered June 20, 1973 directing one of its attorneys in the present action, Mr. Vicente M. Ydrach, to appear at a deposition and produce certain documents which plaintiffs, the Commonwealth of Puerto Rico and its Environmental Quality Board (hereinafter collectively designated as Commonwealth) allegedly *need* and cannot obtain otherwise in order to ascertain whether West is doing business in Puerto Rico and, hence, is subject to process and venue within this jurisdiction in an *in personam* action against West initiated by Commonwealth under the Direct Action provisions of the Puerto Rico Insurance Code, 26 LPRA Sec. 2003(1).[1]

1. Footnotes at the end of this Opinion.

The case has been pending since March 1973, when because of an alleged oil spillage in the navigable waters of Puerto Rico, plaintiffs sued *in rem* the vessel, the M/V Zoe Colocotrone, and *in personam* its owners, Marbonanza Compañía Naviera, S.A., as well as the null and protection and indemnity underwriters at the time unknown, but which subsequently turned out to be West.

On April 12, 1973 the Court granted plaintiffs' motion for leave to serve summons upon West pursuant to Federal Rules of Civil 4(e) and Rules 4.7 and 10.1 of the Commonwealth Rules of Civil Procedure. According to the Return of Service, summons was served on the Secretary of State of the Commonwealth and the Commissioner of Insurance on April 23, 1973.

On June 5, 1973, plaintiffs filed a notice for the taking of the deposition of Mr. Vicente M. Ydrach, which happens to be a member of the law firm of Hartzell, Ydrach, Santiago, Pérez & Novas, who represents West in the present action. The Court in its subpoena required Mr. Ydrach to bring to the deposition, scheduled for the 16th of June, 1973, the documents listed in an attached schedule marked as Exhibit 1.

On June 11, 1973, Mr. Vicente Ydrach moved the Court to quash the notice for taking of deposition and deposition subpoena served on him by plaintiffs on the grounds that in a related action in admiralty, Civil 289-73, Limitation of Liability, the Court, on April 7, 1973, had entered an injunction against prosecution of other actions, in which it made reference to the present case, Civil 252-73, this being sufficient to stay the deposition here in question. Subsequently, and after a reply from defendants, the aforementioned grounds of opposition to the deposition were abandoned by attorneys for defendant West.

Counsel for plaintiffs and West then came to Court and met in chambers pursuant to Local Rule No. 2 to try to

reach an agreement as to the scope of the deposition and production of documents requested. No agreement was reached and thereafter the Court ordered Mr. Vicente M. Ydrach to appear at the deposition sought by plaintiffs and to produce the documents requested by the latter in Exhibit 1 mentioned above. The Court rejected counsel for defendant West's contentions that the documents sought to be produced fell within the coverage of the attorney-client privilege and work-product exceptions to federal discovery as contemplated by *Hickman* v. *Taylor*, 329 U.S. 495.

Defendant West asked for a reconsideration of the Court's order at the close of business on the eve of the taking of the deposition and, since the matter could not come in due time before the Court, then chose to appear through the person of Mr. Vicente M. Ydrach at the deposition, but refused to answer all questions and refused the inspection of documents sought by plaintiffs. The latter have now come with a motion requesting the imposition of sanctions, which we will deal with only to a limited extent, since our prime concern is the reconsideration requested by West.

Faced with the two motions mentioned in the preceding paragraph. the Court thought it best to conduct for itself an inspection of the documents which are said to be privileged, and so issued an order for the production of the same. Defendant West, through its attorneys, readily complied with said order and deposited in chambers approximately forty (40) files containing various letters, telexes, cables, reports and pleadings which, for the most part, have been the subject of claims and cases handled by Hartzell for West.

In view of the voluminous amount of documents contained in each file and the limited time of the Court to engage in a document-by-document perusal in order to determine which ones are privileged and which ones are

not, we refer the files deposited with the Court to the United States Magistrate who shall rule upon each document subject to the guidelines and boundaries of the present opinion.

We also refer to the United States Magistrate plaintiffs' motion for the imposition of sanctions filed on June 25, 1973, since disposition of the same bears close relationship with the specific rulings to be made in light of the principles announced herein.

Before setting forth the criteria to be applied in determining whether and to what extent defendant West's contentions of attorney-client and work-product privileges affect the documents submitted for in-camera inspection, it would be well to remember that discovery regarding the legal sufficiency of service of process so as to acquire *in personam* jurisdiction over the person of a defendant is permitted by the Federal Rules of Civil Procedure, specifically, Rule 26.[2] Indeed, as far back as the year 1958 this Court recognized the importance of discovery proceedings bearing on the issue of proper service of process. *Commonwealth Refining Co.* v. *Houdry Process Corp.*, 22 F.R.D. 306 (D.C.P.R., 1958).

In *Houdry,* the defendant filed a motion to dismiss the complaint challenging the jurisdiction of this Court over its person because it was not subject to service of process within this district and had not been properly served with process in the action. The plaintiff then sought to take depositions of various officers and employees of the defendant Corporation, as well as the production of documents, in order to obtain information necessary to a proper challenge of defendant's motion to dismiss for lack of *in personam* jurisdiction. Defendant opposed the requested discovery. In granting plaintiff's request, the Court held that "wide latitude must be accorded to the plaintiff to establish the requisite minimum contacts" with Puerto Rico and that "a defendant, thus challenging the Court's juris-

diction, has no right to keep its records, personnel and sources of information free from any access by the plaintiff through such reasonable discovery measures as are provided by the Federal Rules of Civil Procedure," 22 F.R.D. at 308.

We see no reason to depart from the judicial policy announced in *Houdry,* even though in this case discovery is directed against one of defendants lawyers. The burden of proof to show that discovery is improper in light of the attorney-client and work-product privileges, as for the jurisdictional issue posed herein, still rests on Defendant West or its attorneys.

With this in mind we turn to consider the principles which ought to guide the Magistrate in determining whether the documents are privileged or not. Although the issue of relevancy has not been directly raised by Defendant West, the Magistrate can also arrive at his own determination on this point.

A—Work Product

Defendant West claims that all the files deposited with the Court, with minor exceptions, are covered by the work-product privilege.

The work-product doctrine springs from *Hickman* v. *Taylor, supra,* and has found its way into Federal Rules of Civil Procedure 26(b)(3), note 2, *supra.*

In general, the protective cloak of work product covers material prepared by an attorney in anticipation of litigation. Such material may include private memoranda, written statements of witnesses and mental impressions of personal recollections prepared or formed by an attorney in anticipation of litigation or for trial. It is not clear whether the term litigation is intended to include *only* the present litigation wherein discovery is conducted and the privilege claimed. See 4 Moore Federal Practice Sec. 26.64(2) (2d

Ed. 1972). Professor Moore states that the determining factor in deciding whether to apply the doctrine to documents prepared in anticipation of a separate litigation are (1) whether the first action is complete; and (2) the degree of relationship between the first and second action. See: *Republic Gear Co.* v. *Borg Wagner Corp.*, 381 F2d 551 (2 Cir., 1967); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 207 F. Supp. 407 (D.C. Penn., 1962); and *Tobacco and Allied Stocks* v. *Transamerica*, 16 F.R.D. 534 (D.C. Del., 1954).

This doctrine has been questioned recently by the Court of Appeals of the Fourth Circuit in *Duplan Corporation* v. *Moulinage et Retordine de Chavanoz, et al.*, 487 F.2d 480, 17 F.R. Serv. 2d 1193 (Oct. 23, 1973), where it held that the work-product doctrine applies to prior, unrelated litigation. The Court found that the interest sought to be protected by the work-product—that a lawyer work free from the worry that he might have to hand out the result of his work to an opposing lawyer—did not justify limiting the work-product protection to the same case and justified extending the doctrine to protect work performed in other unrelated litigation.

However, the Court, in this case, expressly disavowed a wooden application of its holding to any future litigation no matter under what circumstances or whether the party seeking discovery shows a substantial need or undue hardship as contemplated by Rule 26:

> "Our decision will not in any way frustrate the ends of justice. If the party seeking discovery can demonstrate substantial need specified in the Rule and recognized in Hickman, the district court will order production . . ." 17 F.R. Serv., at 1198.

We think that in the case at bar plaintiffs have sufficiently shown a need and the circumstances justify dispensing with the relative shield which this Court of Appeals erected in

the *Duplon* case, *supra*. Plaintiffs are suing a foreign enterprise with its principal place of business and operations in Europe and it would signify undue delay and expense for them to seek discovery of the documents in possession of said company in those circumstances, when they can direct their efforts to the West's correspondents in Puerto Rico. Indeed, it can be said that it is incumbent upon Hartzell to demonstrate (what it has not done, at least with sufficient specificity, in its motions after plaintiffs motion for imposition of sanctions, where the necessity for the documents is set forth) that the documents sought by plaintiffs are otherwise available to them.

Defendant West reads *Hickman* too broadly, in our view. The Court's refusal to permit discovery in that case was prompted by and large on plaintiffs' outright admission that he wanted the oral statements only to help prepare himself to examine witnesses and to make sure that he had not overlooked anything. 329 U.S. at 513. Such a situation is not present in this case. Here plaintiffs need to discover facts otherwise unavailable and within the exclusive knowledge of defendant West and its correspondents, which are crucial to a proper challenge to defendant West's motion to quash service of process, and, as it was recognized in the *Houdry* case, *supra*, "wide latitude must be accorded to plaintiffs to establish the requisite minimum contacts . . . through such reasonable discovery measures as provided by the Rules of Civil Procedure. 22 F.R.D. at 308.

We think that in the present case, it is sufficient to confine the scope of the work-product privilege to trial preparation material, such as mental impressions, opinions, and the like, when prepared for a first action not yet completed or which bears a substantial relationship with the present litigation, or in which the same counsel exists on either side.

Of course, what we have said thus far, in no way dispenses with the requirement that in order for materials or

documents such as the above to qualify as work-product of an attorney they must not be primarily prepared in the normal course of business or in view or *not* in anticipation of trial either by the attorney himself or someone else engaged by him. The best guide to a proper determination of these issues, as far as each document is concerned is furnished by Judge Leahy in *Zenith Corp.* v. *Radio Corp. of America*, 121 F. Supp. 792, 795 (D.C. Del., 1954):

> "'[w]ork product' encompasses the impressions, observations and opinions recorded by an attorney, as the product of his investigation of a case in his actual preparation for trial on behalf of a client. It has been extended to include the recorded investigative work of a person hired and acting under his supervision and direction."

B—Attorney-Client Privilege

We now turn to the attorney-client privilege. At the outset we point out that *Hickman* cannot be used as authority to bolster up defendant West's contentions of privilege under this theory.

Though the Court found it unnecessary "to delineate the content and scope of that privilege as recognized in the federal courts", it nevertheless made clear what does *not* fall under the protective cloak of the privilege, finding that it does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does it concern the memoranda, trips, communications and other writings which reflect an attorney's mental impressions, conclusions and opinions or legal theories. *Hickman*, supra, at 508. These type of documents, therefore, cannot be withheld by defendant West under the guise of attorney-client privilege if they are not otherwise protected by the work-product rule we have dealt with

above. What is, then, subject to the strictures of this latter privilege?

In general, federal courts have recognized to the invocation of this privilege the same latitude and scope as that recognized by the common law as for admissibility of evidence is concerned. This means that it must be determined whether the traditional evidentiary criteria identifying this privilege are present in the documents sought to be inspected by plaintiffs.

In our order of July 3, 1973 requesting defendant West to produce the disputed documents for our inspection, we referred to two lower decisions which, in our view, set forth clear and precise principles for the application of the privilege. In other words, for the attorney-client privilege to be successfully involved, it must appear that:

"1. the asserted holder of the privilege is or sought to become a client .....

.....

2. the person to whom the communication was made

(a) is a member of the bar of a court or his immediate subordinate and

(b) is acting as a lawyer in connection with this communication .....

.....

3. the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either an opinion on law, or legal services or assistance in some legal proceeding." *Zenith Radio Corp.* v. *Radio Corp. of America,* 121 F. Supp. at pp. 794-795. See also for a ratification of these criteria, *American Cyan-*

amid Company v. *Hercules Powder Company*, 211 F. Supp. 85, 88-90 (D.C. Del., 1962).

In the case at bar West would be the client asserting the attorney-client privilege, although thus far it has not invoked the privilege directly.

As far as the second requirement for privilege to exist, it is necessary to determine whether the communications contained in the documents which Hartzell has deposited with the Court have been made to the latter exclusively as members of the bar of a court, or even if made to others not necessarily members of any bar, whether they were made in view of and as a part-and-parcel of the original communications to Hartzell.

It must also be determined whether Hartzell has been or is acting as a lawyer in connection with the communications contained in the files deposited with the Court. As stated by Judge Leahy in the *Zenith* case, *supra*:

> "'Acting as a lawyer' encompasses the whole orbit of legal functions. When he acts as advisor, the attorney must give *predominantly* legal advice to retain his client's privilege of non-disclosure, *not solely, or even largely business advice.*" (Emphasis added.) 121 F. Supp. at 794.

The mere fact that Hartzell is a law firm should not be deemed controlling in ascertaining whether in light of specific requests as evidenced by the documents to be inspected by the Magistrate, but rather nature or function of the services rendered by Hartzell as appears from these documents. Hence, it must be determined whether the information supplied by West and acted upon by Hartzell involves application of law to facts or the rendering of an opinion of law in response to the client's legal inquiries. Similarly, those documents or communications pointing to acts by

Hartzell merely as an intermediary or correspondent (following instructions) for a fee in rendering services of a non-legal nature, such as making necessary arrangements for a crewman to be hospitalized or buried, engaging the services of a surveyor for purposes of adjusting insurance claims between West and one of its insured, or making arrangements for the repatriation of seamen, would not be considered privileged within the scope and intendment of the phrase "acting as a lawyer."

We deem the third requirement to be sufficiently self explanatory. However, a cursory view of the present files reveals that there are communications not only between West and Hartzell, but also communications involving other correspondents of West, stevedoring contractors and vessel owners, who might or might not have their vessels insured by West. The Magistrate, in making his ruling as to each document, will bear in mind their relevance to the ultimate jurisdictional issue presented and the fact that said information might be within the exclusive knowledge of West. It must be remembered that documents having a bearing on the litigation at hand do not fall automatically under the attorney-client privilege just because they have been entrusted to a lawyer. Of course, if the documents are so entertained with the legal advice sought so as to form part of the confidential consultation by the client, they might be privileged, if all the other prerequisites for a privilege to exist have been fulfilled.

One last observation. In a motion filed on July 3, 1973, West, through its counsel, expressed its intention to voluntarily produce the following documents for inspection by plaintiffs:

1. 1972 Rules and List of Correspondents of the West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg) requested in

Item 1 to Exhibit 1 of the subpoena directed to Mr. Vicente M. Ydrach.

2. The West of England's Notice to Representatives Abroad, covered by Item 2 of the same Exhibit, which is in fact entitled "Investigation of Claims in Foreign Ports."

3. The circulars, resolutions, correspondence, instructions and messages published and distributed by the West of England and which were mentioned in the course of Mr. Ydrach's attempted deposition which was annexed as Exhibit 1 to plaintiffs' motion for sanctions filed on June 25, 1973.

In view of West's voluntary compliance, the Magistrate need not rule on the documents numbered One to Three above, since whatever privilege might have protected said documents from disclosure has been waived. Nevertheless, the Magistrate may release said documents forthwith to the interested parties or call the parties to a conference or direct them to reach an agreement as to place, time and mode of inspection, whatever in his discretion he may deem more convenient for all concerned.

If the Magistrate considers it appropriate, he may also convene a conference of all counsel concerned in this action to determine whether and to what extent an agreement can be reached as to the scope of discovery herein.

In view of the foregoing, it is hereby ordered that all the files deposited with the Court by Hartzell on behalf of West of England on July 3, 1973 be referred to the United States Magistrate for this District for an in-camera inspection to determine, in accordance with the record and with the principles set forth above, which documents fall under the work-product and attorney-client privilege and which do not. It is suggested that the rulings be set in the manner prescribed in the Appendix to *Zenith Radio Corp.* v.

Radio Corp. of America, 121 F. Supp. 792, 798-801 (D.C. Del., 1954). Prior to the rulings above mentioned, the Magistrate may call counsel for plaintiffs and defendant West to a meeting, in order to try to reach an agreement as to the extent and scope of discovery. The Magistrate may also determine the place, time and mode of inspection of those documents he considers to be not privileged, and whether the deposition of Mr. Vicente M. Ydrach should be continued.

It is further ordered, that, once the Magistrate has issued the rulings aforementioned he shall conduct a hearing on plaintiffs' motion for the imposition of sanctions and determine whether and to what extent the same should be granted or denied;

It is further ordered that, in view of the lack of opposition of plaintiffs to defendant West's motion filed on December 28, 1973 wherein the latter asks to be excused from returning its files 177-8 *Andrés Quintana Riballot* v. *Neptune Navigation Corporation,* Civil No. 528-68 (U.S.D.C. P.R.) and 177-7 *Rubén Santiago Martinez* v. *Compagnie Generale Trasatlantique, et al.,* Civil No. 175-70 (U.S.D.C. P.R.), the same is granted and defendant West excused from returning said files. However, defendant West must return and deposit with the Magistrate immediately all other files removed with the permission of the Court unless the Magistrate determines otherwise and upon the petition of defendant West to that effect.

It is so ordered.

San Juan, Puerto Rico, January 31, 1974.

/s/ HIRAM R. CANCIO

Hiram R. Cancio
Chief U.S. District Judge

FOOTNOTES

Civ. 252-73

1. Said Section provides as follows:

"(1) Any individual sustaining damages and losses shall have, at his option, a direct action against the insurer under the terms and limitations of the policy, which action he may exercise against the insurer only or against the insurer and the insured jointly. The direct action against the insurer may only be exercised in Puerto Rico. The liability of the insurer shall not exceed that provided for in the policy, and the court shall determine, not only the liability of the insurer, but also the amount of the loss. Any action brought under this section shall be subject to the conditions of the policy or contract and to the defenses that may be pleaded by the insurer to the direct action instituted by the insured."

2. Rule 26 provides in pertinent part as follows:

"(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) .....

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule

and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(c) *Protective Orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion."

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civ. No. 252-73

COMMONWEALTH OF PUERTO RICO, *et al.*,
Plaintiffs,

v.

THE SS ZOE COLOCOTRONI, *etc., et al.*,
Defendants.

ORDER

Defendant, the West of England Steamship Owners Mutual Protection and Indemnity Association Ltd. (Luxemburg) (hereinafter WEST) has moved the Court to reconsider its order of June 20, 1973 wherein Mr. Vicente M. Ydrach was ordered to appear at a deposition and produce certain documents concerning whatever agency or correspondence business relationship might exist between the partnership of Hartzell, Ydrach, Mellado, Santiago, Pérez & Novas and its predecessor firms and West so as to enable plaintiffs to discover necessary data, otherwise unavailable, in order to establish whether West is doing business in Puerto Rico and thereby be in a position to answer West's motion to quash the service of process sought by plaintiffs.

The deposition was taken pursuant to the aforementioned order of June 20, 1973 and the specific terms contained therein, on Saturday, June 23, 1973 at 9:55 a.m. at the law offices of Jiménez & Fusté, Condominio Midtown, Hato Rey,

Puerto Rico before Max Olivera Mariani, Esq., Notary Public. Mr. Vicente M. Ydrach appeared and brought with him the documents requested by plaintiffs and ordered to be produced for plaintiff's inspection by the Court. However, he refused to permit any inspection of said documents by plaintiffs and their counsel and also refused to answer questions concerning the subject matter and scope of the discovery sought by plaintiffs and approved by the Court.

Plaintiffs have requested the Court to impose sanctions on defendant West according to Rule 37 of the Federal Rules of Civil Procedure.

The Court has carefully reviewed the Motion to Reconsider and Supporting Memorandum filed by defendant West as well as the Motion for Sanctions, Deposition Record and Supporting Memorandum filed by plaintiffs and has come to the conclusion that the best way to deal with defendant West's insistent claims of attorney-client and work-product privilege and plaintiffs' counter-assertions as to their right to discovery is to conduct an inspection in chambers of documents to determine which ones are privileged and which ones are not and can, therefore, be inspected by counsel for plaintiffs. In essence the Court will follow the guidelines and procedure employed in *American Cyanamid Corporation* v. *Hercules Powder Company,* 211 F. Supp. 85 (D. Del., 1962) and Zenith Radio Corporation v. Radio Corporation of America, 121 F. Supp. 792 (D. Del., 1954.)*

In view of the foregoing, it is hereby ORDERED that defendant West, through Mr. Vicente M. Ydrach, appear before this Court on Thursday, July 5, 1973 at 9:00 a.m. and deposit with the undersigned Judge in his chambers all documents and files subject to the aforementioned order

* The Court wants to make clear that it is not granting or denying either defendant West's Motion to Reconsider or plaintiff's Motion for Imposition of Sanctions. It is simply adopting a posture which will enable it to assess more efficiently the merits of each motion and dispose of them accordingly in the near future.

of this Court of June 20, 1973, including those taken by Mr. Ydrach to the deposition and any other documents which, as plaintiffs allege in their subpoena, might have a bearing on the business relationship which as correspondent or agent the partnership of Hartzell, Ydrach, Mellado, Santiago, Pérez & Novas and its antecessor firms has to defendant West. A receipt for each document shall be issued once they are deposited in chambers.

Notice of the contents of this order shall be given forthwith by phone to plaintiffs and defendant West through their respective counsel besides the usual mail notice.

IT IS SO ORDERED.

San Juan, Puerto Rico, July 3, 1973.

/s/ JOSE V. TOLEDO

JOSÉ V. TOLEDO
United State District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civ. No. 252-73

COMMONWEALTH OF PUERTO RICO, *et al.*,
Plaintiffs,

v.

THE SS ZOE COLOCOTRONI, *etc., et al.*,
Defendants.

ORDER

Defendant, The West of England Steamship Owners Mutual Protection and Indemnity Association (hereinafter West) has moved the Court to quash a Notice for Taking of Deposition and Deposition Subpoena to Testify and to Produce Documents issued by the Court on June 5, 1973 to Mr. Vicente M. Ydrach, also asking for a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure.[1]

1. Mr. Vicente M. Ydrach happens to be one of the attorneys of West. He initially filed a separate motion to quash the notice and subpoena aforementioned on the ground that the same fell within the scope of an injunction which this Court issued against plaintiffs as part of a limitation of liability action filed by the owners of the SS Zoe Colocotroni, which vessel happens to be insured by West. See Rule F(3) of the Supplemental Rules of Admiralty and Maritime Claims. Both counsel for defendant West and counsel for plaintiffs have agreed that the Motion to Quash the Notice of Deposition and Subpoena cannot be sustained on the ground aforementioned and accordingly will deal only with the motions to quash and for a pro-

The Court instructed counsel for plaintiffs and counsel for defendant West to meet in chambers and arrive at an agreement as to whether the challenged deposition should be taken and, if so, the time, place, and manner of taking the same as well as what documents (as specified in Exhibit 1 accompanying the deposition subpoena) should be produced by Mr. Vicente M. Ydrach at said deposition.

Being duly advised by the parties through their respective counsel and having heard their contentions as to the propriety of the challenged deposition and the production of documents requested, the Court finds the Motion to Quash the Notice for Taking of Deposition and Deposition Subpoena to Testify and to Produce Documents and for a Protective Order under Rule 26(c) to be without merit and the same is hereby denied.[2]

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tective order filed on June 18, 1973 by defendant West and signed by José Luis Novas, Esq. on behalf of the law firm of Hartzell, Ydrach, Mellado, Santiago, Pérez & Novas which represents West in Civil Action No. 252-73 (in the nature of a direct action against the insurer). Therefore, the first motion to quash filed by Mr. Vicente M. Ydrach is deemed withdrawn by defendant West on stipulation of the parties and approval of the Court.

2. Counsel for defendant West contend that to permit Mr. Vicente M. Ydrach to depose and produce the documents requested by plaintiffs would violate the attorney-client privilege and "work product" exemptions envisioned by *Hickman* v. *Taylor*, 329 US 495, since the law firm of Hartzell, Ydrach, Mellado, Santiago, Pérez & Novas, of which Mr. Vicente M. Ydrach is a partner, acts only as counsel for West within the meaning of the privileged attorney-client relationship, and not as an agent for West within the meaning of Rule 4 of the Federal Rules of Civil Procedure for purpose of service of process. They contend that the fact that they appear listed as "correspondents' in a pamphlet issued by West entitled "Rules and List of Correspondents" (1971)—an original copy of which was furnished to counsel for defendants in chambers by counsel for plaintiffs and which the former had an adequate opportunity to examine—means nothing, since said list is prefaced by a declaration which says that West does not appoint agents and an asterisk placed besides the name of their firm, as listed, denotes lawyers.

Suffice it to say that this Court is unwilling to read *Hickman, supra,* as furnishing *carte blanche* to insurance companies or associa-

It is ordered, therefore, that the Deposition Subpoena to Testify and to Produce Documents remain in full force and effect and Exhibit 1[3] accompanying the same be modified as follows:

1. Numbers 1 and 2 of said Exhibit 1 shall remain the same except that Number 2 shall be amended to read: "Investigation of Claims in Foreign Ports."

2. Numbers 3 and 4 shall remain the same, except that if the documents there specified be non-existent, Mr. Vicente Mr. Ydrach shall submit a sworn statement to that effect or say so at the deposition under oath.

3. Numbers 5 through 7 shall remain the same, except that the production of documents there requested shall be limited to those in possession of Ydrach, Mellado, Santiago, Pérez & Novas and/or Hartzell, Fernández & Novas which said firm possesses by virtue of any relationship it might have with West as the latter's correspondent and/or correspondent-lawyer, *Provided* that no privileged matter

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tions and their correspondents to circumvent the salutary purposes and liberal policies underlying the federal discovery rules, just because said correspondents happen to be lawyers. It is the nature of the functions performed by the so-called "correspondents" and not the magic of the particular nomenclature employed which is determinative here. Cf. *Goldstein* v. *Compudyne Corporation*, 262 F. Supp. 524 (SDNY 1966).

What we have just said is *not* to be taken as a ruling on the question of whether this Court has jurisdiction in personam over West within the meaning of Rule 4 of the Federal Rules of Civil Procedure relating to service of process. It is only for the purpose of allowing the discovery requested by plaintiffs so that they will be able to take the necessary steps in relation to a Motion to Quash Service of Process filed by defendant West together with the Motion to Quash the Notice of Deposition and Subpoena which we have denied. The Court will deal with the former motion at a future date if the parties put it in a position to do so.

3. Counsel for defendant West as well as Mr. Vicente M. Ydrach were duly served copies of said Exhibit 1 and thoroughly reviewed the same in presence of counsel for plaintiff and the Court.

which involves an exclusive attorney-client privilege within the scope of Rule 26 of the Federal Rules of Civil Procedure need be produced.[4]

It is further ordered that the deposition here in question shall take place forthwith and in any event no later than Saturday, June 23, 1973 at 9:00 a.m. at the place specified in the subpoena to testify and produce documents unless the parties agree to some other time and place.[5]

IT IS SO ORDERED.

San Juan, Puerto Rico, June 19, 1973.

/s/Jose V. Toledo

JOSÉ V. TOLEDO
United States District Judge
(In substitution and following instructions of Chief Judge Hiram R. Cancio)

4. Counsel for plaintiffs and defendant West agreed in chambers that the pamphlet published by West entitled "Investigation of Claims in Foreign Ports" (June 1971) sufficiently describes the functions of a correspondent and/or correspondent-lawyer as listed in the other pamphlet mentioned in Footnote 3. Therefore, Mr. Vicente M. Ydrach must answer all questions propounded in the deposition in relation to said pamphlet. If a more recent pamphlet is furnished by West at the deposition as requested in Number 2 of Exhibit 1, above, said most recent pamphlet shall control subject to whatever the parties might agree thererafter.

5. As to the manner in which the deposition is to proceed, any and all objections which counsel for defendants might raise in regard to the attorney-client privilege, "work product" or any other privilege as contemplated by Rule 26 of the Federal Rules of Civil Procedure must be thoroughly grounded on the basis of *Hickman* v. *Taylor*, 329 US 495 and/or other legal pertinent authorities.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1543 and No. 79-1468

COMMONWEALTH OF PUERTO RICO, *et al.*,
Plaintiffs, Appellees,

v.

THE SS ZOE COLOCOTRONI,
HER ENGINES, APPURTENANCES,
etc., *et al.*,
Defendants, Appellants.

Entered: August 12, 1980

These causes came on to be heard on appeals from the United States District Court for the District of Puerto Rico, and were argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed in part and vacated in part and the cause is remanded for further proceedings consistent with the opinion filed this day.

No costs to any party.

By the Court:

/s/ DANA H. GALLUP
Clerk.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 11(29) OF THE PUBLIC POLICY ENVIRONMENTAL ACT OF THE COMMONWEALTH OF PUERTO RICO, 12 L.P.R.A. § 1131(29) (1978).

§ 1131. Functions and duties

The Board on Environmental Quality shall have, among others, the following duties, powers and functions:

* * *

(29) To bring, represented by the Secretary of Justice, by the Board's attorneys, or by a private attorney contracted for such purpose, civil actions for damages in any court of Puerto Rico or the United States of America to recover the total value of the damages caused to the environment and/or natural resources upon committing any violation of this chapter and its regulations. The amount of the judgment collected to such effect shall be covered into the Special Account of the Board on Environmental Quality.

RULE 4.7 OF THE PUERTO RICO RULES OF CIVIL PROCEDURE (PUERTO RICO LONG-ARM STATUTE), 26 L.P.R.A., APP. II, R.4.7 (1977).

R. 4.7. Substitute service

(a) Where the person to be served is not within Puerto Rico, the General Court of Justice of Puerto Rico shall have personal jurisdiction over said nonresident as if he were a resident of the Commonwealth of Puerto Rico, if the action or claim arises as a result of the following:

(1) Such person or his agent carries out business transactions within Puerto Rico; or

(2) Executes by himself or through his agent, tortious acts within Puerto Rico; or

(3) Meets with an accident while by himself or through his agent driving a motor vehicle in Puerto Rico; or

(4) Meets with an accident in Puerto Rico in the operation, by himself or through his agent, of a freight or passenger-transportation business in Puerto Rico or between Puerto Rico and the United States or between Puerto Rico and a foreign country, or the accident occurs outside of Puerto Rico in the operation of such business, when the contract has been executed in Puerto Rico; [or]

(5) Is the owner, or by himself, or through his agent, uses or owns real property located in Puerto Rico.

(b) In such cases it shall be incontrovertibly presumed that the defendant has designated the Secretary of State of Puerto Rico as his agent and he shall signify his consent so that the former may receive service of summons,

complaints, and judicial notices, and to such effect a copy of the summons and of the complaint shall be served upon the Secretary of State or upon his designee, and the plaintiff shall forthwith send to the defendant a copy of these documents by registered mail with return receipt. Any judicial step so taken shall have the same legal force and effect as a personal service.

SECTION 20.030 OF THE PUERTO RICO INSURANCE CODE (PUERTO RICO DIRECT ACTION STATUTE), 26 L.P.R.A. § 2003 (1977)

§ 2003. Suits against insured, insurer

(1) Any individual sustaining damages and losses shall have, at his option, a direct action against the insurer under the terms and limitations of the policy, which action he may exercise against the insurer only or against the insurer and the insured jointly. The direct action against the insurer may only be exercised in Puerto Rico. The liability of the insurer shall not exceed that provided for in the policy, and the court shall determine, not only the liability of the insurer, but also the amount of the loss. Any action brought under this section shall be subject to the conditions of the policy or contract and to the defenses that may be pleaded by the insurer to the direct action instituted by the insured.

(2) If the plaintiff in such an action brings suit against the insured alone, such shall not be deemed to deprive him of the right, by subrogation to the rights of the insured under the policy, to maintain action against and recover from the insurer after securing final judgment against the insured.

SECTION 11.190 OF THE PUERTO RICO INSURANCE CODE, 26 L.P.R.A. § 1119 (1978)

§ 1119. Limiting actions on policies; jurisdiction

(1) No policy delivered or issued for delivery in Puerto Rico and covering a subject of insurance resident, located, or to be performed in Puerto Rico, shall contain any condition, stipulation, or agreement:

(a) Depriving the insured of right of access to the courts for determination of his rights under the policy in event of dispute.

(b) Depriving the courts of Puerto Rico of jurisdiction of action against the insurer.

(c) Limiting right to institute action against the insurer to a period of less than one year from date cause of action accrues in connection with all insurances other than property and marine and transportation insurances; in property and marine and transportation policies such right shall not be limited to a period of less than one year from the date of occurrence of the event resulting in the loss.

(d) Requiring that the policy be governed by the laws of any other jurisdiction except as necessary to meet the requirements of motor vehicle financial responsibility laws or compulsory disability benefit laws of such other jurisdiction.

(2) Any condition, stipulation, or agreement in violation of this section shall be void, but such voidance shall not affect the validity of the other provisions of the policy.

No. 80-758

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE SS ZOE COLOCOTRONI, MARBONANZA COMPANIA NAVIERA, S.A., COLOCOTRONI LTD., COLOCOTRONI BROTHERS, S.A., THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG) AND THE WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LONDON) LIMITED,

PETITIONERS,

v.

THE COMMONWEALTH OF PUERTO RICO AND THE ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Statement of the Case	1
A. Summary of Pertinent Facts	1
1. The Grounding and Subsequent Oil Spill	1
2. The Parties	2
B. The Proceedings Below	3
1. The Proceedings in the District Court	3
2. The Proceedings in the Court of Appeals	5
a. Jurisdiction	5
b. The Striking of the Pleadings	7
c. The Damages	8
Reasons for Denying the Writ	8
I. The Court of Appeals' Decision Upholding Personal Jurisdiction Over the West of England, Is in Consonance With the Mandate of This Court and, Therefore, the Writ Should Be Denied	8
A. West of England's Presence in Puerto Rico	9
B. The Decision of the Court of Appeals Is Not in Conflict With *World-Wide Volkswagen Corp.* v. *Woodson*, supra	14
C. The Court Below Did Not Devise a "Minimum Contact" Rule for West of England	16
II. Defendants' "Second Reason for Granting the Writ" Is Being Improperly Presented to This Court as They Raised a Defense That Was Stricken and Otherwise Waived by the Defendants	18
III. The Clear Language of Section 1131(29), 12 L.P.R.A. 1131(29) of the Public Policy Environmental Act of the Commonwealth of Puerto Rico Provides of Recovery of the Total Value of the Damages Caused to the Environment and/or Natural Resources by the Polluter	22
Conclusion	31

Page

Appendix A—Order of the United States District Court Dated August 8, 1979 and Entered August 13, 1979 32
Appendix B—West of England's Written Instructions to Their Correspondents in Foreign Ports 38
Appendix C—Pertinent Pages of West of England's List of Correspondents Throughout the World. 50
Appendix D—Contains the Following Statutes: 48 U.S.C.A. 746, 747, 749; 12 L.P.R.A. 43, 44; 31 L.P.R.A. 1023 55
Appendix E—Various Federal and State Statutes Related to Recovery for Living, Natural Resource Damages 58

TABLE OF AUTHORITIES

Cases

Barger v. *Hanson*, 426 F.2d 640 (C.A. 9th 1970) 28
Burgess v. *M/V Tamano*, 564 F.2d 964 (C.A. 1st 1977) *cert. den.* 435 U.S. 941 (1978) 26
California Department of Fish and Game v. *SS Bournemouth*, 307 F.Supp. 922 (1969) 26
Complaint of Steuart Transportation, 435 F.Supp. 798 (E.D.Va. 1977), *aff'd*, *Steuart Transportation Co.* v. *Allied Towing*, 596 F.2d 609 (C.A. 4th 1979) 29
Department of Pollution Control v. *International Paper Co.*, 329 S.2d 5 (Fla. 1976) 26
DeSpirito v. *Bristol County Water Co.*, 102 R.I. 50, 227 A.2nd 782 (1967) 29
Hanson v. *Denckla*, 357 U.S. 235 (1958) 9, 14, 18
Higuera v. *Pueblo International, Inc.*, 585 F.2d 555 (C.A. 1st 1978) 7
Illinois v. *Milwaukee*, 406 U.S. 91, Note 5 (1972) 28

Page

In Re Complaint of Allied Towing, 478 F.Supp. 398 (E.D.Va. 1979) 29

International Shoe Co. v. *Washington*, 326 U.S. 310, (1945) 9, 14, 18

Levi v. *Schwartz*, 201 Md. 575, 95 A.2d 322 (1953) 29

Louisville & Nashville R. Co. v. *Becker*, 126 Ky. 328, 103 S.W. 300 (1907) 29

Lumbermen's Mutual Casualty Company v. *Elbert*, 348 U.S. 48 (1954) 21

Maine v. *M/V Tamano*, 357 F.Supp. 1097 (D.Me. 1973) 23, 26

Maryland v. *Amerada Hess*, 350 F.Supp. 1060 (D.Me. 1972) 23, 26

Matter of Oswego Barge Co., 439 F.Supp. 312 (D.N.Y. 1977) 23

McGee v. *International Life Insurance Company*, 355 U.S. 220 (1957) 14, 17

National Steel Corp. v. *Great Lakes Towing Co.*, 547 F.2d 339 (C.A. 6th 1978) 28

Olympic Towing v. *Nebel Towing Co.*, 419 F.2d 230 (1969) 21

Rector, Wardens & Vestry of St. Christopher's Episcopal Church v. *C. S. McCrossan, Inc.*, 306 Minn. 535, 235 N.W.2d 609 (1975) 29

Standard Oil Corp. v. *Southern Pacific Co.*, 268 U.S. 146 (1925) 28

State v. *Jersey Power and Light Co.*, 308 A.2nd 671 (1973) 26

State Ex-Rel Pollution Control v. *Kerr, McGee Corp.*, 532 P.2d 1386 (Okla. 1975) 26

Stephenville, N. & S.T.Ry. Co. v. *Baker* (Texas Court of Civil Appeals) 203 S.W. 385 (1918) 29

The Baltimore, 75 U.S. 377 (1869) 28

Page

United States v. *SS Ocean Eagle*, 47 F.R.D. 519 (1969).. 12
Watson v. *Employers' Liability Assurance Corporation, Ltd.*, 348 U.S. 66 (1954)..... 20
World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980)..... 9, 14, 15, 17

Constitutional Provisions

Art. VI, Sec. 19 of the Constitution of the Commonwealth of Puerto Rico..... 22, 30

Statutes

Clean Water Act, Section 311, 33 U.S.C. 1321(F)(5). 26, 28
OCS Lands Act, 43 U.S.C. 1813(b)(3)..... 26
48 U.S.C. 731..... 9
731d..... 9
Organic Act of Puerto Rico, 48 U.S.C. 737 9
48 U.S.C. 746, 747, 749..... 22, 30
12 L.P.R.A. 43, 44..... 22, 30
Public Policy Environmental Act of the Commonwealth of Puerto Rico, Section 1131(29), 12 L.P.R.A. 1131(29) 4, 8, 22, 23, 26, 30
24 L.P.R.A. 595..... 23
Insurance Code of the Commonwealth of Puerto Rico,
Chapter 11, 26 L.P.R.A. 1101-1137..... 18, 19
Section 11.190, 26 L.P.R.A. 1119..... 18
Section 20.010, 26 L.P.R.A. 2001..... 20, 21
31 L.P.R.A. 1023..... 22, 30
Florida (F.S.A. Sec. 376.11(5)(c) (1974)..... 26
Maryland (A.C.Md. Natural Resources Sec. 8-1411(f) (1974)..... 26
Massachusetts (M.G.L.A. c. 21 Sec. 27(10) (1973)..... 26
Mississippi (M.A.C. Sec. 49-27-55 (1979 Supp.))..... 26
New Jersey (N.J.S.A. 58:10-23.11g(a)(2) (1979 Supp.)) 26

Page
New York (N.Y. Nar.L. 181(2)(b) (1979 Supp.)) 26
North Carolina (N.C.G.S. Sec. 143-215.90 (1979 Supp.)) 26
Oklahoma (82 O.S.A. Sec. 937(b) (1971)) 26
Oregon (O.R.S. Sec. 468.745 (1977)) 26
Virginia (VA. Code Sec. 62.1-44.15(11)(a) 26
Washington (R.C.N. Sec. 90.48.142 (1977) 26

Other Authorities

Restatement (Second) of Torts, Section 929, 1(a) 1979 24, 29

In the
Supreme Court of the United States

OCTOBER TERM, 1980

No.80-758

THE SS ZOE COLOCOTRONI, MARBONANZA COMPANIA NAVIERA, S.A., COLOCOTRONI LTD., COLOCOTRONI BROTHERS, S.A., THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG) AND THE WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LONDON) LIMITED,

PETITIONERS,

v.

THE COMMONWEALTH OF PUERTO RICO AND THE ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. *Summary of Pertinent Facts*

1. *The Grounding and Subsequent Oil Spill*

On March 15, 1973, the SS ZOE COLOCOTRONI departed La Salina, Venezuela, with a full load of crude oil

for Guayanilla, Puerto Rico. At 0110 hours on March 18, eighteen or twenty miles due south of Puerto Rico the ship's master was not able to establish her position. At 0300 hours on March 18 the ZOE COLOCOTRONI ran out of water and went hard aground 3 miles due south of Puerto Rico. About 10 minutes after the grounding the ZOE COLOCOTRONI dumped 5,170.1 tons or 1.5 million gallons of oil into the sea. This oil, displaced by the elements, came ashore at Bahia Sucia, a natural shoreline mangrove forest in the southwestern tip of Puerto Rico. The oil devastated the entire Bay. The cause of the grounding was the fact that the ship's crew was hopelessly lost while making the approach to Puerto Rico. The factors which directly contributed to this condition were (1) lack of proper charts and nautical publications onboard, (2) the failure of the master to properly compensate for a westerly set in the current, (3) inoperative or defective navigational equipment among which were: (a) the gyro compass, (b) the gyro compass recorder, (c) the fathometer, (d) the fathometer recording device, (e) the radio direction finder, (f) the radar and (g) the radio equipment; (4) an incompetent crew (the third officer, the radio operator and two engineers were unlicensed) and (5) the failure to post a bow lookout. The ZOE COLOCOTRONI was a rust bucket. (58a-67a)[1]

2. *The Parties*

As a result of the spill the Commonwealth of Puerto Rico and its principal environmental agency, the Environmental Quality Board (hereinafter referred to as "E.Q.B.") on March 19, 1973, filed an admiralty suit *in rem* and *in personam* against the SS ZOE COLOCOTRONI and her owners, Marbonanza Compania Naviera, S.A. and/or Colocotroni Ltd.,

[1] Page references to defendants-petitioners' Appendix, which is bound separately are cited " a". Page references to the 10-Volume Appendix used before the Court of Appeals are cited "A ", and the 3-Volume Consolidated Supplemental Appendix as "SA ".

and/or Colocotroni Brothers, S.A. and the underwriters, The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg) and The West of England Ship Owners Mutual Insurance Association (London) Limited (hereinafter referred to as "West of England"). (58a)

B. *The Proceedings Below*

1. *Proceedings in the District Court*

Plaintiffs claimed clean up costs and damages to the natural resources of Bahia Sucia. Admiralty and maritime jurisdiction of the District Court was invoked pursuant to 28 U.S.C.A. 1333. (7a)

West of England moved to quash the service of process made pursuant to the Puerto Rico Long Arm Statute and to dismiss the action. This motion was denied by the District Court in its opinion and order of January 14, 1977. (109a)

On October 21, 1977, the District Court struck defendants' pleadings on the issue of liability and their petition for exoneration from and/or limitation of liability. The District Court left open the question of damages. (103a, 58a)

The District Court found that defendants had exhibited "bad faith and callous disregard of their responsibilities in this litigation", characterized defendants' conduct as "an affront to this court's dignity" and found that the conduct had severely prejudiced plaintiffs' preparation of their case as well as the court's attempts to assure that the trial proceeded as scheduled. (107a) The facts upon which those findings were based appeared fully stated by the Court of Appeals' Opinion of August 12, 1980. (16a-24a)

The trial on the question of damages commenced on November 7, 1977 and lasted six weeks.

On August 15, 1978, the District Court ruled that the Commonwealth of Puerto Rico had standing to sue by reason of its

proprietary interest in the affected property and pursuant to the common law doctrines of "trustees of the public trust" and "parens patriae". The Court also held that the Environmental Quality Board had a cause of action arising under Section 1131(29) of the Puerto Rico Public Policy Environmental Act, 12 L.P.R.A. 1131(29). (67a-70a) The District Court found that 5 years after the spill there was still 23 acres on the west side of Bahia Sucia containing oil impregnated sediments. (84a-86a). The Court further found that over 92 million marine animals were destroyed as a result of the oil spill. (85a) Based on the uncontradicted evidence in the record, the Court concluded that said animals could not be replaced at a cost of less than six cents per animal. The District Court rejected part of plaintiffs' restoration proposal of restoring the area by removing the oil impregnated sediments and replacing said sediments with new material, but did grant plaintiffs the cost of replanting 23 acres of mangrove and the cost of monitoring the plantation for five years. Thus, the court entered judgment in favor of the plaintiffs in the amount of $78,108.89 for plaintiffs' proven and unreimbursed clean up costs; $559,500 for replanting 23 acres of mangrove and monitoring them for five years; and $5,526,583.20 for the replacement cost of the marine animals that were destroyed by the oil spill. (85a-86a)

After filing a timely appeal, defendants asked the Court of Appeals for permission to file in the District Court motions under Rule 60(a) and 60(b) of the Federal Rules of Civil Procedure for the correction of alleged clerical mistakes and for relief from judgment. The Court of Appeals, on June 11, 1979, held that leave was not required prior to filing a Motion for Relief in the District Court under Rule 60(b). (49a-56a)

Defendants then filed Rule 60(a) and (b) Motions before the District Court. In support of their Motion they filed voluminous expert studies and affidavits that they labeled newly discovered evidence. The Commonwealth, on the other hand, had to rebut all this alleged newly discovered evidence.

In essence, the defendants retried the case before the District Court on documents.

On August 8, 1979, the District Court denied defendants' Rule 60 Motions. The Court expressed its serious reservations as to whether the Motions complied with the requirements of Rule 60(b) (2), but in any event examined defendants' materials and found nothing that would move it to alter its original decision.[2]

2. *The Proceedings in the Court of Appeals*

The United States Court of Appeals affirmed the District Court's findings as to *in personam* jurisdiction over the insurance company (24a-30a) and that the E.Q.B. had cognizable cause of action to recover the total value of the damages caused to the environment and/or the natural resources. (31a-33a) The Court of Appeals, however, vacated the District Court's award of damages as measured on the basis of six cents per animal (45a-46a) and remanded the case to the District Court for reevaluation of the damages (47a-48a). A cross-petition for writ of certiorari on said issue has been timely filed by the Commonwealth of Puerto Rico and the E.Q.B., respondents herein.

a. *Jurisdiction*

On the issue of whether West of England properly availed itself of the privilege of conducting business transactions within the Commonwealth of Puerto Rico, thus invoking the benefit and protection of the laws of the Commonwealth of Puerto Rico, the Court decided that the files of the Puerto Rico correspondent of West of England revealed the many instances

[2] In its Order of August 8, 1979, the District Court gives a detailed reasoning as to the method it adopted for computing the damages awarded. The same is attached to the instant Brief as Appendix "A".

in which ships insured by West of England were involved in incidents giving rise to claims or potential claims while the ships were present in Puerto Rico waters. In each of these instances West of England's local correspondent was instructed to take action to forestall claims, to provide services for the shipowners or to prepare for any eventual litigation. The West of England advertised to insured shipowners the fact that such services would be available through its local Puerto Rico correspondent. The contract of insurance contained no provision preventing any ship from calling on Puerto Rico or limiting coverage in the event it did. Not only did West of England know that vessels mentioned in West of England's correspondent's files visited Puerto Rico but it stood to reason that many other West of England insured vessels also did, as West of England's correspondent's files would name only vessels on which claims or other noteworthy incidents occurred. While West of England was not engaged in selling insurance in Puerto Rico, its retention of a correspondent to perform services for insured owners and vessels in Puerto Rico demonstrated that West of England plainly expected its worldwide business of insuring maritime risks to embrace the territorial waters of Puerto Rico with some regularity. West of England plainly knew that vessels it insured would call on Puerto Rico from time to time and it made no apparent effort to halt or limit this practice. In fact by advertising the name of its local correspondent in San Juan, West of England affirmatively encouraged such commerce. It was further determined that this is not a case of a single isolated and unpreventable appearance of an insured vessel in Puerto Rico waters; the record shows that such appearances were a readily foreseeable part of the normal course of business.

The Court of Appeals, after distinguishing the instant case from *World-Wide Volkswagen Corp* v. *Woodson*, 444 U.S. 286 (1980) held:

> "Where as here, the insurer has the means available to structure its primary conduct so as to control the area within which it will be subject to direct action, *where it is undoubtedly aware that the objects of its policies are regularly present in a particular jurisdiction, and where it not only does not act to curtail such presence but actively promotes it by providing contractual services in the jurisdiction, we hold that such an insurer is amenable to personal jurisdiction in the forum.*" (Emphasis added) (30a)

b. *The Striking of the Pleadings*

Defendants contended that the District Court abused its discretion by striking their pleadings on the issue of liability and their petition for exoneration from and/or limitation of liability. The Court of Appeals, after reviewing the record and analyzing the facts, held:

> "...the record supports the District Court's findings that defendants' conduct was *inexcusably recalcitrant* and that *it materially prejudiced plaintiffs' trial preparation and the court's legitimate efforts to keep this protracted law suit moving forward.*" (Emphasis added) (21a)

The Court of Appeals, citing *Higuera* v. *Pueblo International, Inc.*, 585 F2d 555, 557 (C.A. 1st 1978) stated:

> "There comes a point when the question arises who is running the court — counsel or the judge. To this there can be but one answer." (22a)

The defenses being stricken, defendants are now precluded or estopped from raising them before this Court much less argue them.

c. *The Damages*

The Court of Appeals held that the Commonwealth of Puerto Rico, exercising its undisputed authority to protect and conserve its natural environment, had, by statute (Section 1131(29) of the Puerto Rico Public Policy Environmental Act, 12 L.P.R.A. 1131(29)), authorized one of its agencies to maintain actions of this sort.

The Court correctly rejected defendants' contention that damages should be measured by any diminution in market value or loss of use of the affected property or of any loss of commercially valuable plant or animal life. The Court held that a strict application of the diminution in value rule would deny the Commonwealth of Puerto Rico any right to recover meaningful damages for harm to such areas and would frustrate appropriate measures to restore or rehabilitate the environment. The Court of Appeals set the following standard for determining damages in a case such as this:

> "We think the appropriate primary standard for determining damages in a case such as this is the cost reasonably to be incurred by the sovereign or its designated agency to restore or rehabilitate the environment in the affected area to its pre-existing condition or as close thereto as is feasible without grossly disproportionate expenditures." (40a-41a)

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION UPHOLDING PERSONAL JURISDICTION OVER THE WEST OF ENGLAND, IS IN CONSONANCE WITH THE MANDATE OF THIS COURT AND THEREFORE, THE WRIT SHOULD BE DENIED.

The Court of Appeals' decision that the District Court's exercise of personal jurisdiction over West of England did not of-

fend the limitations imposed by the Due Process Clause of the United States Constitution follows the decisions of this Court.[3] Its decision followed the decision of this Court that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he has certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'". *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). The Court of Appeals also followed the ruling of this Court in *World-Wide Volkswagen Corp* v. *Woodson, supra.* For West of England to be subjected to the jurisdiction of the District Court it had to, "purposefully avail itself of the privilege of conducting activities within the foreign state, thus invoking the benefits and protection of its laws". *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958). In this respect the Court of Appeals stated:

> "The record makes clear that West of England did precisely that." (26a)

A. *West of England's Presence in Puerto Rico*

West of England for years had a correspondent in Puerto Rico. The correspondent was appointed by West of England in San Juan to service and assist insured shipowners, their agents

[3] Petitioners' reference at pages 2 and 11 of their brief to the Due Process and Equal Protection Clauses of Section 2 of the Organic Act of Puerto Rico, 48 U.S.C. 737 is not accurate. Section 2 was repealed except for the last paragraph by Section 5 of Public Law 600, approved July 3, 1950, which provided that at such time as the Constitution of Puerto Rico becomes effective, Section 2 of the Organic Act of 1917, except the last paragraph, shall be deemed repealed. See Historical Note at 48 U.S.C. 731. The Constitution of Puerto Rico was approved by Congress on July 3, 1952, and came into force and effect on July 25, 1952, see 48 U.S.C. 731d.

and masters of vessels insured in cases of emergency and difficulty connected with matters covered by West of England's policy of insurance.[4]

West of England, in a document entitled "Investigation of Claims in Foreign Ports", provided its Puerto Rican correspondent with written instructions of how to conduct its business in order to provide insured shipowners, their agents and masters of insured vessels, while in Puerto Rico, services in cases of emergency or difficulty connected with matters covered by West of England's policy of insurance.[5]

In the first paragraph of page 3, that document states:

> "The day-to-day business of The West of England (Luxembourg) is managed by The West of England (London) to whom all correspondence should be addressed. The Association does not appoint agents. Commercial and also legal firms are, however, appointed in the principal ports of the world in order to assist Masters and Ship's Agents when required in relation to claims which

[4] Upon defendants filing their motion to quash service and dismiss the complaint, plaintiffs took the deposition of one of the partners of the Law Firm of Hartzell, Ydrach, Mellado, Santiago, Perez & Novas, West of England's correspondent in San Juan and subpoenaed the documents in Hartzell's possession to establish (1) Hartzell's relationship with West of England and (2) West of England's business contacts with Puerto Rico. West of England produced a pamphlet of instructions to members and correspondents entitled, "Investigation of Claims in Foreign Ports", which was marked as Exhibit I; it also produced its "List of Vessels" insured marked as Exhibit 2; West of England's "List of Correspondents" as Exhibit 3 and West of England's "Rules or Policy" as Exhibit 4. It also produced 20 files containing approximately 320 documents from where West of England's activities with Puerto Rico clearly appeared. All this evidence was submitted by plaintiffs to the court in support of its Brief filed in opposition to defendants' motion to quash summons and to dismiss the complaint on January 30, 1976. (S.A. 48-623).

[5] Said document is reproduced as Appendix B to the instant Brief. (pp. 38-49 *infra*)

fall within the scope of the cover afforded to its Members by the Association, as set out in the Rules."

West of England's "List of Correspondents" contains the name and addresses of all its correspondents throughout the world, and in the introductory paragraph of that document at page 9, it provides:

> "Whilst the Association does not appoint agents, the following are the names of experts and lawyers usually engaged to advise on claims in which the Association is concerned. Captains and agents should consult them in cases of emergency and difficulty connected with matters covered by the Rules to this Association, when there is not time to apply to their owners for instructions.
>
> "In ports where the Association is not specially represented the Captain or his agents should communicate with the Association or telegraph ("WESTENG" - London) for instructions in connection with any serious claim covered by the Rules."

At page 20 of that same Exhibit the name of West of England's representative in Puerto Rico appears advertised. It reads:

> "San Juan (Puerto Rico) - *Hartzell, Ydrach, Mellado, Santiago, Perez & Novas, 1530 Banco Popular Center, Hato Rey, Telephone (809) 765-6075, Telex CW-WUI 3654204 (Hartzell)."
> *Asterisk denotes Lawyers. (S.A.183, 172).[6]

In presenting to this court the questions to be decided, West of England intimates that the only function of West of

[6] Pertinent pages of this document appear reproduced, as Appendix "C" to the instant Brief (pp. 50-54 *infra*).

England's correspondent in Puerto Rico was that of lawyers and nothing else. When West of England appoints a commercial firm as correspondent in a given port, the function of that correspondent obviously is not that of a lawyer for West of England in that particular port. Its functions are going to be related with the insurance business.[7]

Plaintiffs proved to the District Court that West of England's Puerto Rico correspondent acted on its behalf in 27 instances in which a total of 25 vessels had incidents prior to the ZOE COLOCOTRONI casualty.[8] In relation to those incidents the correspondent performed the following services: Made all the arrangements for the burial of a deceased seaman with appropriate religious observances; repatriated by air several other sailors; contracted surveyors to conduct numerous surveys; investigated claims for damages or injuries; adjusted and settled claims; appointed ship agents for insured shipowners; paid insured shipowners' agent's disbursements incurred in attending vessels in Puerto Rico; repatriated stowaways and deserters; recommended to West of England lawyers in the Dominican Republic; took care of and rendered assistance to sick and injured foreign seamen while in Puerto Rico and the Virgin Islands; assisted insured owners in collec-

[7] In *United States* v. *SS. Ocean Eagle*, 47 F.R.D. 519 (1969) a West of England competitor, The London Steam-Ship Owners' Mutual Insurance Association Ltd., appointed William Munch, Inc., a cargo surveyor and marine claims settling agent as its representative in Puerto Rico. The London Club in that case made the same jurisdictional allegations that West of England is making in the instant case and the court upheld the jurisdiction. The court in arriving at the decision analyzed not just the London Club's mode of operating but the many instances in which it conducted business within Puerto Rico through William Munch, Inc., a non-lawyer. The Hartzell law firm, while acting as correspondent for West of England, carried out the same activities for West of England as William Munch, Inc., a commercial firm, conducted for The London Club according to the facts of that case.

[8] The evidence proving these facts is analyzed in S.A. 14-34.

ting freight; arranged for insured owners salvage services; assisted insured owners whenever a ship caused damage to port facilities; assisted in the release of seamen from jail and repatriation; and mitigated Immigration fines imposed to insured shipowners. West of England advertised to insured shipowners the fact that such services would be available through its local Puerto Rican correspondent.[9]

Yet, defendants, as a reason for granting the Writ, ignoring the voluminous evidence in the record evidencing the many business contacts West of England had with the forum prior to the ZOE COLOCOTRONI's casualty, and ignoring the analysis of that evidence made by both the District Court and the Court of Appeals in their respective decisions, argued that the District Court predicated Long Arm jurisdiction on West of England's insurance contract with the owners of the ZOE COLOCOTRONI which insured against risks encountered whenever the vessel might travel. Said party unbelievably argued that no action was cited by the Court of Appeals as a ground upon which the District Court exercised personal jurisdiction. Furthermore it intimated that the only basis for upholding jurisdiction was West of England's failure specifically to exclude Puerto Rico from the coverage of the insurance policy. That is definitely not what the evidence in the record and the two lower court opinions reflect. One receives the impression, following defendants' argument, that the Court automatically will have *in personam* jurisdiction over West of England for its failure to exclude Puerto Rican ports from the coverage of the policy. Defendants failed to bring to the attention of the Court that besides the non-exclusion of the ports from coverage in the policy for years West of England had engaged in business transactions in Puerto Rico through its correspondent. So the basis upon which the Court predicated Long Arm jurisdiction in this case is not just the fact that West

[9] The evidence proving all the above facts appears in S.A. 48-623.

of England failed to exclude or exempt the Puerto Rican ports from the policy but also the various business contacts it had with Puerto Rico.

As this argument of defendants has no merit and is contrary to what the record reflects, the Petition for Writ of Certiorari should be denied.

B. *The Decision of the Court of Appeals is Not in Conflict with* World-Wide Volkswagen Corp. *v.* Woodson, Supra.

In *Woodson, supra,* the Court dealt with facts completely different from those of the instant case. Furthermore, the scope of the Commonwealth of Puerto Rico's Long Arm *in personam* jurisdiction as defined by the case of *International Shoe* v. *Washington, supra; McGee* v. *International Life Insurance Company,* 355 U.S. 220 (1957); *Hanson* v. *Denckla, supra,* and other more recent cases, has been reaffirmed by *Woodson. Woodson* by no means supports defendants' position.

In *Woodson, supra,* respondents did not adduce any evidence that either the dealer or the distributor did any business in Oklahoma, site of the accident. They did not present either any evidence that they shipped or sold any products to or in the state; nor did it have an agent to receive process there; nor did it purchase advertisements in any media calculated to reach Oklahoma. It was even conceded that there was no showing that any automobile sold by respondents had ever entered Oklahoma with the single exception of the vehicle involved in that case.

In the present action, West of England, through its appointed correspondent, conducted business in Puerto Rico and prior to the ZOE COLOCOTRONI oil spill West of England had attended business matters of other ships in Puerto Rico through its correspondent. These considerations alone are sufficient to factually distinguish *Woodson, supra,* from this case.

There can be little, if any, comparison between a car distributor and a dealer whose operations are limited to no more than three states and a Shipowners' Mutual Insurance Association, like West of England, whose business is worldwide, as is clearly shown by its list of correspondents.[10]

That ships insured by West of England would come to Puerto Rico was a foreseeable event. It was not only foreseeable that some of the ships insured by West of England would run into difficulties in Puerto Rico, it was actually expected. What other reasons could there exist for the appointment of a correspondent in Puerto Rico?

Foreseeability is a relevant factor to determine whether or not *in personam* jurisdiction exists over a party. In *Woodson, supra*, at 297 the Court held:

> "The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."

A ship, unlike a car, does not usually move within a limited area, much less a tanker in today's oil-strained world. This was a well-known fact to West of England. The presence of the ZOE COLOCOTRONI in Puerto Rico was much more than a mere likelihood. It was an expected event. West of England foresaw that it could have been haled into court in this forum.

Unlike in *Woodson, supra*, West of England availed itself of the benefits and privileges of the laws of Puerto Rico through its correspondent. Unlike in *Woodson*, plaintiffs did not seek to base jurisdiction on one isolated occurrence of fortuitous characteristics. Unlike in *Woodson*, it is reasonable to require West of England to defend this particular suit and Puerto

[10] (SA167-186)

Rico's interest in adjudicating this dispute is a relevant factor that has to be considered. Finally, Puerto Rico does not offend the Due Process Clause by exercising its jurisdiction over a corporation which voluntarily insures ships which knowingly engage in commerce between ports of the world and Puerto Rico.

The instant case does not deal with a foreign corporation whose only contact with the forum was the fortuity that the car they sold passed through the forum after it had left their hands. Here West of England had appointed a correspondent to attend to the obligations it had assumed in the policy towards its insured shipowners, their agents and ships' captains, "in cases of emergency and difficulty connected with matters covered by the Rules of the Association". (SA172)

The West of England argued it had no property in Puerto Rico; never solicited nor sold insurance in Puerto Rico; no member of West of England is a resident of Puerto Rico. But, West of England cannot ignore the fact that surveying, investigating, adjusting and settling of claims and providing its insured shipowners, their agents and ships in Puerto Rico with whatever services are needed in cases of emergency and difficulty connected with matters covered by the policy are very important parts of West of England's insurance business.

In the light of all the above, plaintiffs submit that West of England was at the time of the casualty present in Puerto Rico and the Petition for Writ of Certiorari should be denied.

C. *The Court Below Did Not Devise a "Minimum Contact" Rule for West of England*

The Court did not deny West of England's right to the equal protection of the laws. Defendants argue that the Court of Appeals devised a special minimum-contacts rule for insurance companies which would deny them equal protection of the laws. They base this argument on what the Court of Appeals said in Footnote 18 of the Opinion, which reads as follows:

> "...the result we reach is further buttressed by the Supreme Court's occasional suggestions that the test for measuring minimum contacts for insurance companies may be somewhat less stringent than for other nonresident corporations because of the forum state's public policy interest in promoting effective redress for injuries. See *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957); cf. *Hanson* v. *Denckla*, 357 U.S. 235, 252 (1958). Here the maritime accident resulted in injury to Puerto Rico's coastal environment, and plaintiffs represented this forum-related interest." (30a)

With that statement the court was adding support to results already reached in the decision. The Court found jurisdiction over West of England not because Puerto Rico's public policy interest in promoting effective redress for injuries made the contacts for insurance companies somewhat less stringent than for other nonresident corporations. Jurisdiction was upheld because of West of England's frequency, quantity and quality of all its contacts within Puerto Rico.

Defendants would be correct in making such an argument had the contacts of West of England with Puerto Rico been non-existent or insignificant as in *Woodson, supra*. Upholding jurisdiction resting on that type of contact would obviously constitute the discriminatory treatment that West of England is alleging. However, defendants fail to inform the Court that West of England's contacts with Puerto Rico were not that meaningless. They were frequent and substantial; much more substantial than the contact International Life Insurance Co. had with the State of California in *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957).

In *McGee* an insurance policy which had been taken out with an Arizona corporation was later assumed by the defendant, a Texas corporation, which issued a reinsurance certificate by mail to the insured in California. Thereafter, the

defendant mailed premium notices to the insured in California who in turn mailed the premium payments to the defendant in Texas. The insurance company had absolutely no other contact with the forum. In the instant case West of England appointed a correspondent in Puerto Rico. Then a number of insured ships were sent to Puerto Rico, where their owners, agents and masters received from West of England, through its correspondents, those services which it had to provide in accordance with the policy.

This Court, in *Hanson* v. *Denckla*, *supra*, repeated and followed the privileged concept enunciated in *International Shoe Co.*, *supra*, *Id.* 319, 321. *Denckla* stands for the proposition that to be present the defendant must voluntarily do some act, which, if performed, is expected to have effects in the forum state. West of England's appointment of a correspondent in Puerto Rico through which its business could be transacted, is the act to which this Court referred in *International Shoe Co.*, *supra*, and *Denckla*, *supra*.

II. Defendants' Second Reason for Granting the Writ is Being Improperly Presented to This Court as They Raise a Defense That Was Stricken and Otherwise Waived by the Defendants.

In their second reason for granting the writ defendants argued that they are free to oppose the "no action" clause in the policy because the invalidation of these clauses in Section 11.190 of the Insurance Code of Puerto Rico (26 L.P.R.A. 1119) is ineffective, as the policy was not delivered or issued for delivery in Puerto Rico.

Section 11.190 does not apply to the facts of this case, not because of the reason advanced by defendants in pages 16-17 of the Petition but because the cited section is part of Chapter II of the Insurance Code of the Commonwealth of Puerto Rico (26 L.P.R.A. 1101-1137) which in Section 11.010 (26

L.P.R.A. 1101) expressly excluded protection and indemnity insurance from its scope. It provides:

> "1101 Scope of Chapter
> "(1) The applicable provisions of this chapter shall apply to insurance other than *ocean marine* ...
> "(2) For the purpose of subsection (1) and this title, '*ocean marine* and foreign trade insurances' shall include only; (a) insurances upon vessels, crafts, hulls and of interest therein or with relation thereto; (b) insurance of marine builders risks, marine war risk, and *contracts of marine protection and indemnity insurance*. . ." (Emphasis added)

In the fourth question presented for review by this Court and in the argument commencing on page 16 of the Petition, defendants did not raise a jurisdictional question, rather they posed the question of whether the complaint failed to state a claim against West of England upon which relief can be granted, one of the affirmative defenses which they could have raised in their responsive pleadings or by separate Motion. If the alleged "no action" clauses preclude plaintiffs' direct action for the reasons advanced by defendants, the question is one of sufficiency of the cause of action or claim for relief, not one of jurisdiction over the person or over the subject matter. Presenting this question for review to this Court is most improper. If that defense was raised in the responsive pleadings, same was stricken by the Court on October 21, 1977.

Moreover the question of whether the District Court abused its discretion in striking their pleadings and defenses and the question of whether it erred in upholding *in personam* jurisdiction over West of England were presented for review before the Court of Appeals, but there the defendants failed to make the argument they are now making, thus depriving the Court of Appeals from ruling on it. The Court of Appeals for

the reasons stated in its Opinion affirmed the District Court. (16a-23a)

In their Petition defendants did not present for review that part of the Court of Appeals' decision upholding the District Court's striking of defendants' pleadings and preventing their defenses from being considered on the merits. Yet they dare argue a defense that was struck below and of which they did not seek review before this Court. Defendants are precluded from arguing this question before this Court as a reason for granting the Writ.

Assuming arguendo that defendants could raise that defense before this Court, their argument would still be meritless.

What defendants call the "no action" clause in the policy[11] is actually a prohibition which only affects the insured not the injured. The insured shipowner cannot exercise his "right to recover from the funds" of West of England "in respect of any liability" until "he shall first have discharged or paid the same". That is not a "no action" clause. The "no action" clause prevents suits of recovery by any person against the insurer. See text of a "no action" clause in *Watson* v. *Employers' Liability Assurance Corporation, Ltd.*, 348 U.S. 66, 74-75 (1954). But assuming arguendo the clause is a "no action" clause, the same is expressly prohibited by section 20.010 of the Insurance Code of Puerto Rico, 26 L.P.R.A. 2001, which provides:

> "The insurer issuing a policy insuring any person against loss or damage through legal liability for the bodily injury, death, or damage to property of a third person,

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[11] Payment First by Insured Owner

"18. Unless the Association in its absolute discretion shall otherwise determine it shall be a condition precedent of an insured Owner's right to recover from the funds of the Association in respect of any liability, costs or expenses that he shall first have discharged or paid the same." (SA 198)

shall become absolutely liable whenever a loss covered by the policy occurs, *and payment of such loss by the insurer to the extent of its liability therefore under the policy shall not depend upon payment by the insured or upon any final judgment against him arising out of such occurrence.*" (Emphasis added)

It has been held that the direct action statute nullifies altogether a "no action" clause and gives to the injured person the right to proceed against the insurer directly either alone or together with the insured before recovery of a judgment against the insured. *Olympic Towing* v. *Nebel Towing Co.*, 419 F2d 230, 236-237 (1969).

The "no action" clause defense, like "failure of notice" is a technical defense in respect to which the insurer is severly restricted in advancing if not foreclosed from asserting. *Lumbermen's Mutual Casualty Company* v. *Elbert*, 348 U.S. 48, 51 (1954).

The loss being claimed by the plaintiffs was covered by the policy.[12]

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[12] E. (1) For loss or damage caused to any property or for infringement of any rights relating to property, whether on land or on water or whether fixed or movable,...

(2) Subject to acceptance in writing of the risk by the Association on such terms and conditions as the Association may determine, for liabilities arising under the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution dated 7th January, 1969 (TOVALOP) and also for any costs and expenses reasonably incurred with the prior approval of the Association (regardless of fault on the part of the insured vessel) for the purpose of avoiding or minimising such liabilities; PROVIDED ALWAYS that the Association's liability under this Sub-Rule shall in respect of each incident be limited to U.S. $100 per G.R.T. subject to a maximum of U.S. $10,000,000. (S.A. 193-194)

III. The Clear Language of Section 1131(29), 12 L.P.R.A. 1131(29) of the Public Policy Environmental Act of the Commonwealth of Puerto Rico Provides for Recovery of the Total Value of the Damages Caused to the Environment and/or Natural Resources by the Polluter.

Plaintiffs, respondents herein, are filing a cross-petition for a Writ of Certiorari on the issue of the measure of damages. The discussion that follows is limited to the reasons advanced as to why Certiorari should not issue on the Petition filed by the defendants.

Defendants do not question, nor could they, the power of the Commonwealth of Puerto Rico to enact legislation for the protection and conservation of its natural resources. 48 U.S.C. 746, 747, 749, Art. VI, Sec. 19, Const. Com. of P.R.; 12 L.P.R.A. 43, 44; 31 L.P.R.A. 1023.[13] In the exercise of this undisputed authority to protect and conserve the resources held in trust for its people, the Commonwealth has by statute authorized one of its agencies, co-plaintiff, the Environmental Quality Board, to maintain actions to recover from polluters the value of the damages caused to the environment. 12 L.P.R.A. 1131(29). This exercise of the police power of the Commonwealth of Puerto Rico has not been alleged to be invalid.[14]

[13] The previously cited Constitutional and statutory provisions, Art. VI, Sec. 19 of the Constitution of Puerto Rico; 48 U.S.C.A. 746, 747, 749, 12 L.P.R.A. 43, 44; 31 L.P.R.A. 1023, are set forth in full in Appendix "D" (pp. 55-57 *infra*)

[14] In addition to the E.Q.B.'s allegation in the complaint under Section 12 L.P.R.A. 1131(29), the Commonwealth of Puerto Rico also alleged a cause of action under its common law right as trustee of the Commonwealth's natural resources, in its quasi-sovereign capacity and in its capacity as *parens patriae*. The District Court found that the Commonwealth had standing to sue to recover for oil pollution harm to Bahia Sucia and related resources "because it has proprietary interest in the same . . . . because it is the trustee of the

Under Section 1131(29) of 12 L.P.R.A., the E.Q.B. has, among others, the following duties, powers and functions:

> "To bring, represented by the Secretary of Justice, by the Board's attorneys or by a private attorney contracted for such purpose, civil actions for damages in any court of Puerto Rico or the United States of America *to recover the total value of the damages caused to the environment and/or natural resources,* upon committing any violation of this chapter and its regulations. The amount of any judgment collected to such effect shall be converted into the special account of the Board on environmental quality." (Emphasis added) . (160a)

The Court of Appeals found that this statute both created a cause of action as the type described by its terms and designated the E.Q.B. as the proper party to bring such an action (33a), upon violation of the anti-pollution provisions, 24 L.P.R.A. 595.[15]

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public trust in those resources...and additionally, in its capacity as parens patriae..." (69a). The Court of Appeals held that the Commonwealth had by statute authorized the E.Q.B. as the proper party to bring this action, and in order to avoid the risk of double recovery and possible confusion, the Court found it unnecessary to consider whether, had the Legislature of Puerto Rico not delegated to the E.Q.B. the right to maintain such suits, the Commonwealth would have an inherent right to bring it itself (33a-34a). However, other Federal courts have addressed this question and have held that a state has a sovereign interest in its coastal waters and natural resources sufficient to maintain a "parens patriae" action on behalf of its citizens to protect such interests. *Maine* v. *M/T Tamano*, 357 F.Supp. 1097 (D.Me. 1973); *Matter of Oswego Barge Co.*, 439 F.Supp 312, 321-322 (D.N.Y. 1977); *Maryland* v. *Amerada Hess*, 350 F.Supp 1060 (1972).

[15] "It shall be unlawful for any person, directly or indirectly to throw, discharge, pour or dump or permit to throw, discharge, pour or dump into the waters, any organic or non-organic material capable of polluting or leading to the pollution of said waters as to place them out of the minimum standards of purity that the Secretary of Health may establish under Section 599 of this Title."

Unable to challenge the E.Q.B.'s right to maintain this action, and unable to allege any constitutional bar to the legislation that empowers the E.Q.B. to seek damages to recover the total value of the damages caused to the environment and/or natural resources (33a), defendants in their eleventh hour, attack the clear language contained in the statute and allege that the Court of Appeals' interpretation of the same is "novel and expansive". (Defendants' Petition, p. 17).

Defendants argue that the measure of damages envisioned by the E.Q.B.'s statute is the common law "diminution in value" rule. Under said rule the measure of damages for tortious injury to real property is the difference in the commercial or market value of the property before and after the event causing injury. They cite *Restatement (2nd) of Torts*, Section 929, 1(a) 1979. Defendants' next argue that since there has been no reduction in the per acre commercial market value of the land area of Bahia Sucia, the Commonwealth of Puerto Rico and the E.Q.B. are not entitled to recover any damages for the injuries caused by defendants' intentional dumping of 1-1/2 million gallons of crude oil into the coastal waters of Puerto Rico.[16] Defendants' reasoning is clearly contrary to the manifest intent of Puerto Rico's Environmental Statute which authorizes the E.Q.B. to recover the total value of the damages caused to the environment and/or natural resources. (36a) Acceptance of defendants' proposition which finds absolutely no support in the statute or in logic, would effectively deny the government the power to regulate and protect the natural resources entrusted to its care while permitting polluters to escape liability for the destruction of natural resources they often cause.

The Court of Appeals placed defendants' allegations in proper perspective when it stated:

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[16] Defendants candidly state that it is "undisputed that Mangrove trees and marine organisms were killed by the oil spill ... and that the Commonwealth of Puerto Rico is the owner of the entire area polluted by oil. (Defendants' Petition, p. 3).

"We believe that defendants have misconceived the character of the remedy created by Section 1131. The E.Q.B. is not concerned with any loss in the market or other commercial value of the Commonwealth's land. In point of fact, the E.Q.B. concedes the land has no significant commercial or market value. The claim, rather, is for the injury— broadly conceived—that has been caused to the natural environment by the oil spill. ...the District Court found that the once flourishing natural environment of the West Mangrove had been seriously damaged by the oil, to the point where some of the underlying sediments were no longer capable of supporting any but the most primitive forms of organic life, such as worms. The Puerto Rico statute authorizing this action specifically empowers the E.Q.B. to recover 'the total value of the damages caused to the environment and/or natural resources' upon a violation of the antipollution provisions. 12 L.P.R.A. 1131(29). Implicit in this choice of language we think is a determination not to restrict the state to ordinary market damages. Many natural areas of considerable ecological value have little or no commercial or market value. Indeed, to the extent such areas having commercial value it is logical to assume that they will not long remain unspoiled, absent some governmental or philanthropic protection. A strict application of the diminution value rule would deny the state any right to recover meaningful damages for harm to such areas, and would frustrate measures to restore or rehabilitate the environment." (36a-37a)[17]

[17] Inasmuch as the Court of Appeals recognized that the E.Q.B. is entitled to recover the "total value of the damages to the environment, and/or natural resources" and that the damage determination is not restricted to "ordinary market value", it was an error to vacate the District Court's award based on replacement cost of the animals destroyed. This matter is covered at length in the Commonwealth's Cross-Petition for Writ of Certiorari.

Puerto Rico's environmental statute is by no means unique or novel. Governmental and public awareness of the need to conserve and protect limited natural resources, as well as their growing knowledge of the consequences of oil pollution has led the Federal government and the governments of various states to enact legislation.[18]

Various Federal and state courts have recognized the right of a state to seek damages for injury to living non-commercial resources. *Burgess* v. *M/V Tamano*, 564 F.2d 964 (C.A. 1st 1977), *cert. den.*, 435 U.S. 941 (1978); *California Department of Fish and Game* v. *SS Bournemouth*, 307 F.Supp 922 (1969); *Maine* v. *M/V Tamano*, 357 F.Supp 1102 (1973); *State Ex-Rel Pollution Control* v. *Kerr, McGee Corp*, 532 P2d 1386 (Okla. 1975); *State* v. *Jersey Power and Light Co.*, 308 A.2nd 671 (1973); *Maryland* v. *Amerada Hess*, 350 F.Supp 1060 (D. Me. 1972); *Department of Pollution Control* v. *International Paper Co.*, 329 S.2nd 5 (Fla. 1976). Defendants have not advanced any valid reason that would justify disregarding the clear language of Section 1131 and apply a rule of common law damages which was intended for private property, real and personal, with a market value, and which has no place in a case filed by a sovereign seeking to recover damages to the

[18] Restoration or replacement costs of the natural resources damaged is the measure of damages contained in the Clean Water Act, 33 U.S.C. 1321(f)(5) and the OCS Lands Act, 43 U.S.C. 1813(b)(3). Replacement cost is also being used in state programs established to recover for living, natural resources damage. Florida (F.S.A. Sec. 376.11(5) (c) (1974);

Maryland (A.C.md. Natural Resources Sec. 8-1411(f) (1974); Massachusetts (M.G.L.A. c.21 Sec. 27(10) (1973); Mississippi (M.A.C. Sec. 49-27-55 (1979 Supp.)); New Jersey (N.J.S.A. 58:10-23.11g(a) (2) (1979 Supp.)); New York (N.Y. Nar. L. 181(2)(b) (1979 Supp.)); North Carolina (N.C.G.S. Sec. 143-215.90 (1979 Supp.)); Oklahoma (82 O.S.A. Sec. 937(b) (1971)); Oregon (O.R.S. Sec. 468-745 (1977)); Virginia (Va. Code Sec. 62.1-44.15(11) (a)); Washington (R.C.W. Sec. 90.48.142 (1977)). The previously cited statutory provisions are set forth in full in Appendix "E" to the instant brief.

natural resources that have been entrusted to its protection. The importance of preserving and protecting these resources carries with it the need of an adequate remedy against the tortfeasor to recover the value of the damage caused to the environment or the natural resources. (36a-39a, 67a, 70a).

As the Court of Appeals stated:

> "In recent times, mankind has become increasingly aware that the planet's resources are finite and that portions of the land and sea which at first glance seemed useless, like salt marshes, barrier reefs, and other coastal areas, often contribute in subtle but critical ways to an environment capable of supporting both human life and other forms of life on which we all depend. The Puerto Rico statute is obviously aimed at providing a damages remedy with sufficient scope to compensate for and deter the destruction of such resources; and while we can see many problems in fashioning such a remedy, we see no reason to try and frustrate that endeavor. We, therefore, do not limit damages herein to the loss of market value of the real estate affected." (39a)

The Commonwealth of Puerto Rico, in the present action, does not stand as a private citizen seeking to recover traditional damages to an injury to real property, but rather the claim of Puerto Rico is one for the loss of living, noncommercial resources of immense value to the People of Puerto Rico. (36a)

Ironically, the narrow scope of defendants' arguments overlook the most basic rule of tort recovery, one which was recognized by the Courts below—to place the injured party as nearly as possible in the same position he would have been in had there been no tort. (85a)

Defendants' oil spill constituted a breach of Federal maritime law (35a) and plaintiffs' claim for relief came within

the admiralty jurisdiction of the District Court. As stated by the Court of Appeals:

> "Where the injury occurs in the territorial waters of a state, the general rule is that admiralty will give 'broad recognition of the authority of the states to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to Federal laws or the essential features of an exclusive Federal jurisdiction (citations omitted) ..." (35a)

The measure of damages in this case would be no different than the measure of damages under maritime collison law. The maritime doctrine of *restitutio in integrum* calls for restoration of Bahia Sucia to its condition prior to the spill. *The Baltimore* v. *Rowland*, 75 U.S. 377, 385 (1869); *Barger* v. *Hanson*, 426 F.2d 640 (C.A. 9th 1970); *Standard Oil Corp.* v. *Southern Pacific Co.*, 268 U.S. 146 (1925); *National Steel Corp.* v. *Great Lakes Towing Co.*, 574 F.2d 339 (C.A. 6th 1978).

As recognized by the Court of Appeals, states may seek damages for injury to all natural resources, including those not generally traded commercially (37a-42a). As noted by the Court of Appeals, the course of recent Federal legislation in the area of oil pollution allowing representatives of any State to act on behalf of the Public Trust of the natural resources to recover for the cost of replacing or restoring such resources further shows the incompatibility of the diminution rule in recovery for environmental damages.[19] (37a-38a). Contrary to defendants' assertion, a State's claim is not precluded or limited by Section 311 of the Clean Water Act. 33 U.S.C. 1321

[19] Although these statutes came into effect after the trial, this Court has stated that environmental protection statutes may provide useful guidelines for interpreting the common law. *Illinois* v. *Milwaukee*, 406 U.S. 91, Note 5 (1972).

Complaint of Steuart Transportation, 435 F.Supp 798 (E.D. Va. 1977), aff'd. *Steuart Transportation Co.* v. *Allied Towing*, 596 F.2d 609 (C.A. 4th 1979); *In Re Complaint of Allied Towing*, 478 F.Supp 398 (E.D. Va. 1979).

Defendants have requested that a Writ of Certiorari be granted, alleging that the rejection of the diminution rule by the District Court and the Court of Appeals is in direct irreconcilable conflict with other decisions of other Court of Appeals. This statement is incorrect. Defendants have not cited one single case in which a Federal court has held that a state or its designated agency is limited to the diminution in the value of the real property when seeking compensation for the damages caused to its natural resources.

The cases cited by defendants in support of the "diminution value" rule merely restate common law principles for measuring losses resulting from injury or destruction of marketable or commercial property but are entirely inapprorpriate for measuring the damage society suffers when valuable living non-commercial resources are destroyed. As defendants are forced to admit (p. 20 of the Petition) when property has a special significance damage claims are not constrained by the diminution of market value. Restatement (2nd) of Torts, Sec. 929 (1)(a) Comment B (1979). *DeSpirito* v. *Bristol County Water Co.*, 102 R.I. 50, 227 A.2nd 782 (1967) (damage for destruction of wearing apparel not limited to market value); *Rector Wardens & Vestry of St. Christopher's Episcopal Church* v. *C. S. McCrossan Inc.*, 306 Minn. 535, 235 N.W.2d 609 (1975) (damage for destruction of shade tree not limited to market value diminution of land); see also *Stephenville N.& S.T.Ry. Co.* v. *Baker* (Texas Court of Civil Appeals) 203 S.W. 385 (1918) and *Louisville & Nashville R. Co.* v. *Beeker*, 126 Ky. 328, 103 S.W. 300 (1907); *Levi* v. *Schwartz*, 201 Md. 575, 95 A.2nd 322 (1953) (replacement costs in excess of market value diminution awarded for loss due to removal of lateral support). (39a)

The special significance and importance that Puerto Rico has placed on its limited natural resources cannot be overstated. Sec. 19 of Article VI of the Commonwealth's Constitution provides that:

> "It shall be the public policy of the Commonwealth to conserve, develop and use its natural resources in the most effective manner possible for the general welfare of the Community."

The Commonwealth is entrusted with the control of all the beaches and maritime terrestial zone abutting the navigable waters of Puerto Rico as well as the living and non-living resources there located, for the benefit of the People. 48 U.S.C.A. 746, 747, 749, 12 L.P.R.A. 43, 44. Because of the importance of these coastal areas and the natural resources they contain, these areas are not susceptible to private ownership, and, therefore, they cannot have a market value as does marketable or commercial property. 31 L.P.R.A. 1023.

For the foregoing reasons it is submitted that coastal resources such as those in Bahia Sucia having special significance to the People of Puerto Rico, damage claims to said natural resources are not constrained by the diminution of market value of the real estate, and in accordance with Section 11(29) of the Puerto Rico Environmental Act, the Commonwealth has a right to recover the total value of the damages caused to the environment and/or its natural resources.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil Number: 252-73

THE COMMONWEALTH OF PUERTO RICO and the ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO
Plaintiffs

v.

THE S.S. ZOE COLOCOTRONI, her engines, appurtenances, etc., et al.,
Defendants

ORDER

Pursuant to the Orders of the United States Court of Appeals for the First Circuit, April 24, 1979 and June 11, 1979, Defendants have filed two Motions under Rules 60(a) and (b) of the Rules of Federal Procedure, 28 U.S.C., for the correction of clerical mistakes and the vacating of Judgment. In the present Order we entertain both Motions.

Separate analysis of each follows below.

I. *The Rule 60(b) Motion.*

Although Rule 60(b) is a liberal remedial rule which draws on the historical authority of a court to avoid injustice it has its time, place, and circumstances. See gen.: 7 Wright & Miller, *Federal Practice and Procedure*, §2857 *et seq.* 7 *Moore's Federal Practice*, §60.18(8)-§60.24(5). It is not an invitation for a *de novo* assestment of the evidence, *Williams* v. *McKenzie*, 576 F. 2d 566, 570 (C.A. 4, 1978), or an opportunity to relitigate, *Posttape Associates* v. *Eastman Kodak Company*, 68 F.R.D. 323 (E.D.Pa., 1975), nor is it a substitute for an appeal, *Fackelman* v. *Bell*, 564 F. 2d 734 (C.A. 5,1977). Extraordinary relief, such as contemplated by Rule 60(b), calls for ex-

ceptional circumstances. See: *Horace* v. *St. Louis Southwestern Railroad Company*, 489 F. 2d 632 (C.A. 8, 1974).

In the instant action Defendants, citing different parts of the record and proceedings, have filed for relief from a judgment which in their view should not stand because of newly discovered evidence, surprise, mistake, fraud, and misrepresentation and misconduct by Plaintiffs.

Central and foremost in Defendants claims of entitlement to relief is the argument that a mistake was committed in the calculation of the area which sustained damage. From this, Defendants follow that the calculations as to the total animal and plant destruction must also be erroneous. In our decision of August 29, 1978 we made a finding of damage to marine organisms in approximately 20 acres and damage to mangrove area covering about 23 acres. We believed then, as we do now, that our study of the evidence submitted and our examination during the on site inspections justified such a finding. Nothing added by Defendants as an afterthought convinces us to the contrary.

As further grounds for relief Defendants state that they were surprised, misled, and misrepresented to by Plaintiffs. Surprise is claimed on the specifics of Plaintiffs' theory of recovery. Misrepresentation is alleged on the nature and source of authority for such a theory. Defendants state they were misled when Plaintiffs changed their claim for relief. With respect to these contentions we simply state that the amended complaint sufficiently put Defendants on notice as to what it was that compensation was sought for, and that the record of discovery proceedings would reveal that Defendants had adequate notice as to what this compensation encompassed. We cannot label these contentions a "surprise" if Defendants chose not to further investigate, pursue, or follow up on information it had received in the pleadings and during discovery.[1] Nor can we

[1] Curiously enough no allegation is made under the "excusable neglect" provision of Rule 60(b).

label them "misleading" if Defendants chose to disbelieve and pursue another avenue of litigation strategy. "Rule 60(b) is not to be invoked to give relief to a party who has chosen a course of action which in retrospect appears unfortunate or where error or miscalculation is traceable really to a lack of care." *Sadowsky* v. *Bombardier Ltd.*, 530 F. 2d 615, 618 (C.A. 7, 1976).

The argument that Plaintiffs misrepresented their theory of recovery is close to the argument that we erred in the method we adopted to calculate the amount of damages. The gist of both is that there is no authority for such a formula for relief and that Plaintiffs' witness misrepresented that there was.

In the present action we have found a recoverable wrong. It is an ancient, elementary, and hardly novel principle of law, that a transgressor correct or compensate that party which he has injured.[2] Where the assestment of the amount of recovery is a complex question by reason of the facts and the relative newness of the field in question, the Court's task will undoubtedly be more difficult. But this can hardly excuse the fashioning of an adequate remedy. And in terms of difficulty, we cannot compare the present case's situation with that encountered in the valuation of human life or limbs, an everyday occurrence in the courts, on which subject no aid is received from available catalogues.[3]

The law knows no magic formula for computation of an award of damages.[4] What is required is only that damages

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[2] See gen.: Wigmore, "Responsibility for Tortious Acts: Its History", 7 HARV. L. REV. 315, 1383, 448 (1894).

[3] Note: 74 Am.Jur. 2d., Torts, §74.

[4] Upon close examination the method we adopted is in fact no radical deviation from traditional norms. In most general terms damages for "physical harm to [property] is closely tied with the concept of value... Value necessarily involves the idea of some standard by which it can be determined. What we are looking for is the financial equivalent of the property or the harm to it. ... The theory underlying this is that the Plaintiff, given his financial equivalent,

awarded have their bases in the evidence presented before a Court. Here there was sufficient evidence to sustain our findings. We are of the opinion that the method used, the "lowest possible replacement cost", has support in the record and is a fair and equitable method of assessing damages under the particular setting of this case. To the extent the Defendants argue that the method of damage computation is a judicial mistake, that we wrongly decided a point of law, the issue is technically the proper subject for adjudication on appeal rather than review on a Rule 60(b) Motion. See: *Silk* v. *Sandoval*, 435 F. 2d 1266 (C.A. 1, 1971) cert. den. 402 U.S. 1012 (1971).

The last areas of concern in Defendants' Motion for relief concern the scientific accuracy of tests performed and submitted into evidence and objected references to certain catalogues which set or did not set market values on the organisms destroyed in the case before us. With respect to these points Defendants have submitted: the report of an expert done after the entry of Judgment, and affidavits from nine persons involved in some facet of the biological supply field. Both submissions are impressive examples of steps that should have taken place prior to trial. During trial these concerns should have properly been the subject of cross examination and rebuttal evidence. The "mere second thought" of a litigant does not, however, compel Rule 60 (b) relief. *Mayberry* v. *Maroney*, 529 F. 2d 332, 337 (C.A. 3, 1976). Having examined Defen-

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can go out on the open market and replace the property by buying other property freely offered for sale." Prosser, *Cases and Materials on Tort* (Foundation Press, 1971) p. 1069. The validity of this general principle is not diminished by the uniqueness of the market or the non-salability of the object. See *Id.*, at p. 1071. Just as Defendants argue that the "lowest replacement cost" is unfound as resulting in too high an award, Plaintiffs may argue that it was too low. Arguments of this type fall under no category of relief under Rule 60(b).

dant's materials[5] we find nothing that would move us to alter our original decision.

II. *The Rule 60(a) Motion.*

Defendants sought, and were granted, leave to file a Rule 60(a) Motion, correction of clerical mistakes, and instead now seek relief more properly brought pursuant to Rule 10(e) of the Fed.R.App. P. The issue, succinctly, is the correction of the record on appeal.

Under Rule 10(e) the parties may by stipulation direct that an omission or misstatement be corrected. From Defendant's Motion and Plaintiffs' opposition we find that such is the case with respect to six of the contested items that make up the record on appeal. The following, on stipulation, shall be STRICKEN from the record.

(1) Exhibit 50 a Transcript of Trial Cr. 61-73.
(2) Exhibit 50 b Certified copy of Information and Judgment in Criminal 61-73.
(3) Exhibit 39 The Ecology of A Mangrove (Booklet)
(4) Exhibit 43 Mangroves of Arid Environments in P.R. (Booklet)
(5) Exhibits 20 a and 20 c Field Notes.
(6) The items listed in the Supplemental Index transmitted to the Court of Appeals on May 1, 1979.

All other issues regarding this Motion deal with whether or not the items in dispute were admitted into evidence. Defendants seek correction of the record by striking these items. Plaintiffs oppose by stating that they were admitted. Counsel for Defendants has filed an affidavit wherein he states that it

[5] A great deal of Defendants' documents,reports, affidavits, and other exhibits are filed as "newly discovered" evidence. Although we have examined and considered them on ruling on this Motion we have serious reservations that they qualify as that type of "evidence which by due diligence could not have been discovered in time to move for a new trial", or that with due diligence could not have been presented at trial. Cf. *Posttape Associates* v. *Eastman Kodak Company*, supra at p. 327.

was his understanding that under this Court's Order he was to meet with opposing counsel and the Courtroom Clerk and mark proposed exhibits for identification purposes only. This was not the Order of this Court. Further this is a completely and totally erroneous interpretation of the same. The parties were to mark items as to which there was no objection as Exhibits; if there was an objection to its admissibility it was to be marked as an identification. See esp.: pages 122-123 of the transcript of Trial Proceedings. This is part of the Local Rules of this Court, see Local Rule 9, and it has always been the operating policy of this Judge.

For all the above-cited reasons the Motion for Relief from judgment, Rule 60(b), is DENIED. The Motion for Correction of the Record, except as otherwise stipulated and noted in this Order, is DENIED. The Clerk of the Court is instructed to insure that the Clerk of the Court of Appeals for the First Circuit and all counsel of record are expeditiously notified.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 8th day of August, 1979.

/s/ JUAN R. TORRUELLA

JUAN R. TORRUELLA

U. S. DISTRICT COURT JUDGE

APPENDIX B

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION & INDEMNITY ASSOCIATION (LUXEMBOURG)

To Members and Correspondents

The day-to-day business of The West of England (Luxembourg) is managed by The West of England (London) to whom all correspondence should be addressed. Thc Association does not appoint agents. Commercial and also legal firms are, however, appointed in the principal ports of the world in order to assist Masters and Ship's Agents when required, in relation to claims which fall within the scope of the cover afforded to its Members by the Association, as set out in the Rules.

A list of these correspondents is included in the Book of Rules, a copy of which is issued to Owners and Master of each vessel entered in the Association, and also to the said correspondents.

When assistance is required in United Kingdom ports, Masters or Ship's Agents should contact tho Association's Managers in London who will, if necessary, arrange for legal and/or technical assistance to be provided at the port concerned.

In ports where both commercial and legal firms have been appointed, the former should, in the first instance, be contacted by Masters or Ship's Agents. If the matter is one which the commercial representatives consider requires the Intervention of lawyers, they will make the nccessary arrangements with the Association's local lawyers, or with lawyers of their own choosing, if the Association has no appointed legal representative.

It is very desirable that there should be the closest liaison between the respective correspondents in a port, and although the assistance of lawyers should not be sought unnecessarily,

where the matter concerned involves (or may involve) the vessel in a substantial claim, or where the circumstances present particular difficulties, the Association's lawyers should be consulted promptly in order that a thorough investigation can be conducted while the vessel is still in port.

The general requirements of the Association from its correspondents is that they fully investigate the circumstances relating to the matter on which they have been consulted, obtaining full statements from the ship's officers and/or crew and independent witnesses (if any). Where necessary, competent surveyors should be engaged in conjunction with the ship's agents.

Advice should be given to the Master about any procedural steps which should be taken by him to protect his, or his Owners' position, in accordance with local or statutory law, e.g. Noting Protest.

Arrangements should be made to obtain authenticated abstracts from the log books relating to the matter under investigation, and in the case of claims for damage and/or loss of cargo such abstracts should cover the whole of the voyage, i.e. from the loading of the cargo to its discharge.

When investigations have been completed a full report should be made to the Association's Managers in London together with the witnesses' reports etc. The Association welcomes the views of its correspondents as to, (1) the cause of the accident or loss and (2) the legal responsibility of the ship.

In no case should liability be admitted or any payment made unless authorised by the Association.

It should be pointed out that although, generally speaking, the vessels entered in the Association are owned by the Members concerned, and claims made against them would be in their capacity as Owners, the Association also accepts entries on behalf of Time Charterers and Voyage Charterers. The vessels which are the subject of such entries do not appear in the printed list of vessels, but the Master should have in his

possession evidence of entry in the Association. Correspondents can always obtain confirmation of the Association's interest by cabling direct to the Association's London Managers.

In some cases the Association has entries for both the Owners and the Charterers of a particular vessel.

The list of vessels entered in the Association as issued to correspondents should be regarded as no more than a guide—vessels may be withdrawn from, or new vessels entered in, the Association after the list is printed. Special terms of entry apply to some members under which certain risks are excluded or subject to special deductibles.

It is therefore essential that prompt advice of claims is given to the Association's London Managers in order that the extent of its interest can be confirmed.

The attention of correspondents is drawn to Rule 19 which sets out the deductibles applying to certain types of claims, and to Rule 16 which lays down the conditions under which costs and expenses may be recovered from the Association. It will be noted that such costs, etc., are only recoverable in respect of claims for which the Association has (or could have had) liability. It follows, therefore, that costs and expenses incurred in respect of claims for which the Association could never have had any liability are not recoverable from the association. Where such claims are referred to correspondents for their attention they should point out to the Members or their agents that, as the Association's liability is not involved, their advice and assistance is provided on the understanding that their charges will be for account of the Members concerned. It may help to avoid misunderstanding to set out the rules of practice which we apply.

(1) If the ship concerned is named in our list, the Club will pay direct to the Correspondent his fee and disbursements, provided only that the service he rendered was in respect of a matter within the

terms of a full cover; but

(2) Every Correspondent is required to give the Club notice of a new case as soon as possible. If the ship concerned is named in our list but the matter for which a Correspondent has rendered a service is excluded from that ship's cover by a special term, (e.g. a special deductible), the Correspondent will be so informed in the Club's reply. And in that event the Club will send the Member a copy of the Correspondent's letter, at the same time advising him that the Club is not concerned and that the cost of handling the case will be for his account. The Correspondent, if he wishes to continue to handle the case, is recommended to write to the Member also, asking whether the Member wants him to carry on with the case. The Club will pay direct to the Correspondent his charge for services reasonably rendered until the time he received the Club's reply, provided that there was no unnecessary delay in giving the Club notice of the case. Notwithstanding this payment the Member remains responsible to reimburse the Club; and

(3) As our list of entered ships is published only once a year and it is not practicable to circulate amendments from time to time, it might well happen that a Member or Agent of a ship that is not named in our list rightly insists that she is nevertheless entered with the Club. In such cases Correspondents are recommended to telex us for instructions and render any service that cannot await our reply. Even if the ship is not entered, the Club will pay the Correspondents for any charge reasonably incurred before our reply is received.

Correspondents should submit their accounts to the Association as promptly as possible after completion of the case or

when their services are no longer required in relation to the matter concerned.

In the event of a vessel being arrested (or threatened with arrest) and bail or other security required to obtain the vessel's release, the Association may, in its sole discretion, provide such bail or security on application being made to the Association's Managers in London. *No bail or other security should be provided on behalf of the Association, without the express authority of the Association first being obtained.*

CARGO CLAIMS. It is sometimes assumed by the Charterers' Agents that because a vessel is entered in the Association by the Owner, the Association's correspondents should advise on, and/or approve payment of, cargo claims. If under the terms of the Charter Party the Owners are relieved of liability for cargo claims, and the Charterers have not covered their cargo risks with the Association, the Charterers' agents should be referred to their Principals for instructions.

As a general rule it is not necessary that minor cargo claims of a routine nature (e.g. shortages) be submitted to the Association's correspondents. Before settling such claims, however, ship's agents should be satisfied that the ship's liability is involved and the amounts claimed do not exceed the carrier's contractual or statutory limit of liability. The Association's correspondents should be consulted in all cases where the ship may be involved in a heavy cargo claim, and in dealing with such claims, correspondents should bear in mind the bill of lading conditions and exceptions and the established law relating to such claims. Where the bill of lading incorporates the terms, conditions and exceptions of the Charter Party a copy of the latter document can usually be supplied by the Master for inspection. If, however, it is not available the correspondents should advise the Association's London Managers who will obtain a copy and advise them as to liability of Owners and/or Charterers.

Correspondents should not approve claims for settlement

without first satisfying themselves that the sum claimed is not in excess of any limitation provided by the bill of lading.

Where damage to cargo occurs a surveyor should be appointed to attend aboard the ship with a view to ascertaining the cause and extent of the damage. If the Master anticipates that the cargo has suffered damage, he should radio his Owners to this effect, in order that the Association can arrange, through its correspondents, for a surveyor to attend aboard immediately on arrival of the vessel.

Surveyors representing cargo interests should not be allowed aboard unless accompanied by the ship's surveyor and the ship's agent. In this respect it should be mentioned that surveyors appointed by Lloyds Agents almost invariably represent cargo interests.

Where cargo has been damaged by water which has obtained entry to the cargo compartment through a broken pipe or valve and it is found necessary for a renewal to be made the old part should be carefully preserved so that, if required, it can be produced as evidence in the vessel's defence.

In respect of cargo carried on deck, claims for damage and/or loss of deck cargo should be rejected by reference to bill of lading clauses and conditions.

Where there is evidence that deck cargo has been lost overboard during heavy weather the Master should be advised to Note Protest, and the consignees supplied, if required, with copy of the Protest and relevant log extract to enable them to claim on their Insurers.

CUSTOMS PENALTIES. The Customs Regulations of all Countries are designed primarily to protect the State from infringements of its rights and statutes, both from inside and outside of the Country, and are of necessity very wide in their application.

It follows, therefore, that the import vessel is the object of particular attention by the Customs Authorities and all shipping documents are closely scrutinized. As a result any errors in

Manifests as to quantity or description of goods on board may result in heavy fines being imposed on the vessel. Failure to accurately manifest all dutiable goods whether owned by the ship, crew or passengers invariably involves the imposition of not only heavy fines, but also confiscation of unmanifested property, in some countries it is an offence for a vessel to enter a port when she has been "constructed, adapted, altered or fitted for the purpose of concealing goods".

It is a requirement in certain countries that ship's documents, such as Crew List, bill of Health, etc., must be visaed by their Consuls at loading ports and/or the last port of call, and failure to do this involves the vessel in a penalty on arrival at the discharging port.

Members should, therefore, impress upon their Masters and Agents the necessity of fully acquainting themselves, before or at the time of loading, with the relative Customs requirements at the port or ports of discharge, and that all documentation complies with such requirements.

In the event of a fine being imposed on the vessel, the Association's correspondents should immediately be consulted by the ship's agents, in order that they can consider whether a petition should be made to the Director of Customs for cancelation of or a reduction in the fine.

PERSONAL INJURY AND SICKNESS CLAIMS. When medical assistance is required, Masters and/or ship's agents should apply to the Association's local correspondent.

If hospital treatment is necessary the Association's correspondent will give advice as to a hospital whose charges are considered reasonable. Private Clinics should, as a general rule, be avoided.

All medical and hospital accounts (exceeding £50) must be submitted to the Association's correspondent for approval before payment, in order to avoid overcharges. Accounts approved for payment by the Association's correspondents should be endorsed as follows:

"Examined and approved for payment subject to the conditions of the vessel's entry in the West of England Steamship Owners Protection and Indemnity Association Ltd."

If an account is considered excessive and a suitable reduction cannot be obtained, such account should be endorsed to the effect that it is considered excessive and the Association advised accordingly.

All serious accidents to members of the crew, and all injuries, no matter how trivial they may appear to be, suffered by passengers, longshoremen or third parties should be reported to the Association's correspondents in order that the correspondents may, at their discretion, conduct on-board investigations into the cause and circumstances of the accident. Such statements should contain details of any witness concerned, to enable him to be contacted if this should become necessary. In the case of crew members, the man's home address and the official number of his Seaman's Book of Service should be quoted. The greatest care must be exercised to prevent any part of the ship's gear (the breakage or failure of which may have caused or contributed to the accident), from being removed from the ship by any unauthorised person. Such gear should, immediately following the accident, be taken out of use and, in the case of portable gear such as ropes, wires or blocks, be handed to the Association's correspondents at the earliest possible moment, in case it is required for examination by a Specialist to determine the cause of the failure, and/or for forwarding to the place where claim is subsequently brought. Where the broken gear is a part of the vessel's structure, or is not easily removable ashore, the Association's correspondents/lawyers investigating should arrange for the defective part to be properly surveyed and photographed. In the event that a claim arising out of the accident is intimated, the Association's London Managers should immediately be informed with the fullest possible details and should be kept closely advised regarding all developments.

When an officer or seaman is left behind, the ship's agents should be instructed to arrange for the man's repatriation on the cheapest terms available. Provision is made under the British Merchant Shipping Acts (Distressed Seamen's Regulations) for a seaman from a British vessel to be sent home as a Distressed British Seaman (D.B.S.) on a conveyance order issued by the Consul or Shipping Master. Every effort should be made to obtain this means of repatriation. Seamen from foreign vessels can often be sent home on another vessel of the same flag at victualling rates, by arrangement with the Master or Owner concerned.

Where is it necessary, for any reason, to repatriate crew members by air, excess baggage charges should, where possible, be avoided or otherwise kept to a minimum. This can be achieved by forwarding any heavy articles, not immediately and necessarily required, by sea as personal effects.

STOWAWAYS. When stowaways are discovered on board subsequent to sailing, the Master should immediately radio the ship's Agents at the next scheduled port of call: -

(1) The stowaway's port of embarkation, date of sailing from that port and place and estimated date of arrival at next port of call.

(2) Full particulars of stowaway: -
   (a) Full names.
   (b) Last known address prior to stowing away.
   (c) Date and place of birth.
   (d) Nationality claimed by stowaway.
   (e) Full names and last known address of wife, parents or next-of-kin.
   (f) Details, including description. Official number and date and place of issue of any Passport or other identification document in the stowaway's possession.

If the vessel is due to arrive at her next scheduled port of call within a few days of discovery of the stowaway, the above in-

formation should also be repeated by radio to the Association's correspondents (either direct or via the ship's agents) at that port, thereby enabling our correspondents to advise their local Immigration Authorities of the man's impending arrival, and to make any necessary arrangements for his custody on board, or ashore, whilst the vessel is in port.

In the event that the stowaway possesses a valid passport or other identification documents, the Association's correspondents should make immediate application to the local Consulate of the country of which the man is, or claims to be, a National, in order to obtain official permission for his re-entry to that country. Where such permission is obtained, the authority of the local Immigration Officials should be sought for the stowaway to be landed from the ship with a view to his deportation, at the first available opportunity, to the country which has authorised his re-entry.

Since, in many instances, a stowaway does not possess any valid identification or travel documents, and the possibility of landing and effecting his deportation from the vessel's first port of call is therefore remote. Owners or their Agents on receipt of the Master's radio advice should pass on to the Association in London the full details received from the Master, together with information concerning the vessel's future movements, i.e. future ports of call and estimated dates of arrival in those ports, so that the Association may, through its correspondents in the country of which the stowaway claims to be a national, endeavour to obtain verification of his claim and official permission and documents enabling him to return to that country. Such documents and authority will, when obtained, be forwarded in advance of the vessel's arrival with the stowaway on board, to our correspondents at a subsequent port of call, with instructions relative to the landing and repatriation of the man from their port.

DESERTERS. In countries where the act of desertion by members of the crew constitutes a breach of the local immigration Laws or Regulations which is punishable by a fine upon the ship, the Master, if he has reason to suspect that any member of his crew intends to desert, should notify the Association's local correspondents prior to or immediately on arrival in port, thereby enabling the latter to make such arrangements as may be required to prevent the man's desertion. In the U.S.A. the boarding Immigration Official may, without giving reason for so doing, order any member(s) of the crew to be detained on board throughout the vessel's stay in a U.S. port. On service of a "Notice to detain" upon the ship, the Master should inform the Association's local correspondents who will arrange for the employment of suitable shore guards to prevent the detainee(s) from leaving the ship. Under no circumstances should a crew member be permitted to set foot ashore until he has been cleared by the local Immigration Authorities and been granted a landing permit. In the event that, despite all precautions, a man does desert, the fact should be reported immediately by the Master to the Association's correspondents and/or the ship's agents so that Immigration Authorities may be notified—the earlier the Authorities know of the desertion the greater are the chances of the deserter being apprehended.

When a fine in respect of a deserter is levied upon a ship, our correspondents should be notified when they will, in conjunction with our local lawyers, take all possible steps to obtain remission or mitigation of the fine imposed.

On a deserter being apprehended after the vessel has sailed, the Association's correspondents will assist the ship's agents in deporting the deserter at the minimum possible cost to the shipowner.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LONDON) LIMITED

CLASS II—FREIGHT, DEMURRAGE & DEFENCE. The scope of this Class is much wider than might be supposed from the three items that are traditionally used to describe it. It may be assumed that the Association is interested in almost any matter affecting a ship entered in this Class, other than matters which are the concern of the P. & I. Association.

Members of the Class are covered by the Association only for the costs and expenses incurred in prosecuting or defending a matter that comes within it, and it is particularly important, therefore, that correspondents should send the Association reports regularly so that the Member may be kept informed of the progress of the matter.

Whenever a Master of ship's agent applies to a correspondent for advice or assistance the correspondent should ascertain whether the ship concerned is entered in this particular Class by reference to the list of entered vessels. If there is any doubt as to whether or not the vessel is entered, the correspondent should write or cable to the Association, depending on the urgency of the matter.

It is also important that the correspondent should send a report to the Association on any matter which he receives direct from the Shipowner, Master or ship's agent, so that the Association may be advised of the matter as soon as possible and assume conduct of it. Before any action is taken involving expense, correspondents should immediately communicate with the Association so that its interests in the matter may be confirmed and its approval of the proposed procedure given.

June 1971

APPENDIX C

LIST OF CORRESPONDENTS

Whilst the Association does not appoint agents, the following are the names of experts and Lawyers usually engaged to advise on claims in which the Association is concerned. Captains and agents should consult them in case of emergency and difficulty connected with matters covered by the Rules of this Association, when there is not time to apply to their owners for instruction.

In ports where the Association is not specially represented the Captain or his agents should communicate with the Association or telegraph ("WESTENG" London) for instructions in connection with any serious claim covered by the Rules.

Telegraphic Addresses shown thus: (Westeng).
Asterisk denotes Lawyers.

Abadan
Gray, Mackenzie & Co. Ltd. Telephone 2488 (Gray)

Abidjan
Societe Navale Chargeurs Delmas-Vieljieux. 17, Av. Louis Barthe, P.O.B. 1281
Telephone 22-88-41 Telex 617 (Samled)

Acapulco
Agencias Maritimas del Pacifico, S.A., Presidente Miguel Aleman s/n., Muelle Fiscal, Acapulco, Gro.
Telephone 2-19-56 (Ammsa Acapulco)

Adelaide
*Finlayson & Co., Epworth Bldg., 33, Pirie St.
Telephone 86901 Telex AA 82779 (Galicia)

Aden
Luke, Thomas & Co. (Aden Shipping) Ltd., Steamer Point
Telephone 4861-4 (Thomas)

Agadir
Societe Marocaine de Protection Maritime, c/o., Mr. Canal, Bungalow Marhaba, Av.
Mohamed V. Telephone 31-52 Telex Somaf 21048 (Tranpeschaud)

Alexandria
*Abdel Hadi & Yansouni, 32, Bd. Saad Zaghioul, P.O. Box 152, ALEXANDRIA
Telephone 21351 (Aicoss Alexandria)

Algiers & District

Almeria

Witty S.A., Plaza Medinaceli 5, BARCELONA
Telephone 222-07-70 Telex 54707
(Witty Barcelona)

Amsterdam

Phs. Van Ommeren (Amsterdam) NV., 120 De Ruijterkade, P.O.B. 1457
Telephone 6-22-88 (Esomins)

Van Der Faltz & Voute, Herengracht 499
Telephone 24-01-94 Telex 14291
(Addis)

Post & Co. N.V., P.O.B. 443, 93, Westersingel, ROTTERDAM
Telephone 36-20-33 (After hours (01804) 52-81) Telex 11277
(Jacspost Rotterdam)

Ancona

Humbert Kane, 2 Piazza S. Maria, P.O.B. 157
Telephone 24352 Telex 56069 Agebrok
(Kane)

Annaba

Raymond Barthelemy, 5, Rue de Flandre Annaba
Telephone 35-21 Telex 93040
(Expermari)

Antigua & Montserrat

*Sir Fred Phillips, C.V.O., LL.B., c/o, C.O.R. Phillips, O.C., Phillips & Phillips, St. Mary Street, St. John's, Antigua

Antofagasta

The Pacific Steam Navigation Company, Casilla 990
Telephone 21032 (Pacific Antofagasta)

Antwerp

M.F. Caethoven & Co. P.V.B.A., 37, Frankrijklei
Telephone 33-59-63 Telex 32370
(Caethoven)

Apapa

*Gerald Impey, Barclays Bank Chambers, 40, Marina, P.O. Box 2879, Lagos, Nigeria
Telephone 26159 (Impey Lagos)

Aqaba

Abou Zeid & Nazzal, P.O.B. 194 AMMAN
Telephone 24104 (Nakel Amman)

Arica

Hansen y Cia. Ltda., Casilla 115 Telephone 31188 (Band Arica)

Ashdod

M. Dizengoff & Co. Ltd., (P & I section) P.O. Box 255.

Athens

*Deucalion Rediadis & Sons, 18/20, Anatasiou Tsoha Street, Athens 602
Telephone 662-719 (Derediadis Piraeus)

Commercial Representative

P.P.D. Holman, see Piraeus Telephone 676054

Auckland

*Hesketh & Richmond, 6th Floor, Norwich Union Bldg., Cnr. Queen & Durham Sts.

Telephone 20-389 (Herisco)

Augusta

Ditta Carlo A. Ali, Via Dusmet 131, Catania, Sicily. P.O.B. 209

Telephone 214-922 (Exposhíp) or (Ali)

S. Tagliavia & Cia., c/o Frateli Bonanno, Via Garibaldi 3/5

Telephone 74319 (Tagilaviaco Augusta)

San Francisco

*McCutchen, Doyle, Brown, Trautman & Enersen, 601, California Street, San Francisco 8

Telephone (415) 981-3400 (Macpag)

*Lillick, McHose, Wheat, Adams & Charles, (Claims Dept.), 500, Sansome St.

Telephone (415) 981-8666 (Pandiclub)

San Juan (Puerto Rico)

*Hartzell, Ydrach, Mellado, Santiago, Perez & Novas, 1530 Banco Popular Center Hato Rey, San Juan, P.R. 00918

Telephone (809) 765-6075 Telex CW-WUI 3654204 (Hartzell)

Santa Marta

W. Moller & Cia, Ltda., c/o Ricardo Fuentes Almaceny Fuentes, Apartado Aereo 524

Telepnone 2067 (Mollercol)

Santos

L. Figueriedo S.A., Rua Visconde do Rio, Branco 2, Caixa Postale 813

Telephone 2-7135 Telex 22841 (Doralice Santos)

Savannah, Ga.

*Lawton, Sipple & Chamlee, 26, East Bryan Street, P.O. Box 9523, Georgia 31402

Telephone (912) 232-3165 (Lawton)

*Connerat, Dunn, Hunter, Houlihan, Maclean, & Exley, Savannah Bank & Trust Bldg., P.O. Box 9848

Telephone (912) 233-6685 (Ancan)

Savona

Alfredo Saidelli, Via Santorre di Santarosa 2-5

Telex 27531 Saidelli (Saidelli)

*Studio Mordiglia, 14-17, Via XX Settembre, GENOA

Telephone 581-848 (Name Genoa)

Sete

L. Thos. & Geo. Budd, P.O. Box 842 Colbert, 8, Rue Beauvau, 13 Marseilles (1 er)

Telephone 33.71.36 (Budd Marseilles)

Seattle

Howard, Le Gros, Buchanan & Paul, 2910 Seattle First National Bank Building,
1001 Fourth Ave., SEATTLE

Telephone Main 3-4990 (Hufhay Seattle)

Seoul
Hyopsung Shipping Corp., P.O. Box 236, Kwang Hwa Moon, Seoul
Telephone 22-2442 (Hyopsung Seoul)

Seville
MacAndrews & Co. Ltd., Plaza de Calvo Sotelo, 5, Apartado 99
Telephone 22-67-76 Telex 72049 MCSEV (Macandrews)

Sfax
Societe Commerciale Tunisienne, Rue de Remada, P.O. Box 154
Telephone 21-400 Telex 512 (Socotu)

Sharjah
Gray, Mackenzie & Co. Ltd. (Gray)

Shimizu
Shimizu Shipping K.K., Kashiwa Bldg., No. 10, 4, Chome, Minato-cho
Telephone 2-8201 (Shiship Shimizu)

Singapore
Boustead Trading SDN, BDH., P.O. Box 899 Maritime Bldg., Collyer Quay
Telephone 913355 Telex RS 21010 (Bousmarine)
*Drew & Napier, 30/35 Chartered Bank Chambers, P.O. Box 152
Telephone 982633 (Jures)

Skikda
M. Andre Raynal, c/o Societe Algerienne de Navigation, Charles Schiaffina & Co.,
P.O.B. 119 Telephone 56-24A26 Telex 90 075 (Navgeri)

Sousse
Societe Commerciale Tunisienne, Cours De La Marine
Telephone 12 (Socoto)

SPAIN
General Representatives:
Witty S.A., Plaza Medinaceli 5, Barcelona
Telex 54707 (Witty Barcelona)

Spezia
Hector Alinghieri, 19, Via Vittorio Veneto
Telephone 31179 (Hector La Spezia)
*Studio Mordiglia, 14-17, Via XX Settembre, GENOA
Telephone 581-848 (Nemo Genoa)

St. John, New Brunswick
Furness, Withy & Co. Ltd., 22, King St.
Telephone (506) 693-2613 Telex 014-47212 (Furness)
*Guss, Taylor & Gregory, Ritchie Bldg., 50, Princess Street
Telephone 693-2565 (Argus)

St. John's Newfoundland
Bowring Bros. Ltd., Box 4100
Telephone (709) 578-0431 Telex 016-202 (Bowring)

St. Kitts/Nevis/Anguilla
*Sir Fred Phillips, C.V.O., LL.B., c/o, Mr. Denis Byron, Chambers, Basseterre

St. Lucia

*Sir Fred Phillips, C.V.O., LL.B., c/o Mr. Vincent F. Floissac, Q.C., LL.M., Chambers, P.O. Box 601, Columbus Square, Castries, St. Lucia, West Indies.

Telephone 2887 (Flody)

St. Malo-St. Servan

Follin, Delamaire & Fourcade, 9 Chausses des Corsaires, P.O.B. 179, St. Malo (I & V)

Telephone 34-83-21 Telex 73.926 (Naval. St. Malo) (Ships. St. Malo)

St. Nazaire

S.A. Jokelson & Handtsaem, Bd. Leferme 44

Telephone 70-20-10 Telex 71.931 (Jokelson or Trouvemar)

St. Vincent (Cape Verde Isles.)

Millers & Corys, Cape Verde Islands, Ltd. St. Vincent

Telephone 418 (Orlop Sanvicentedecaboverde)

APPENDIX D

48 U.S.C.A. § 746. Public lands and buildings; reservations; rights prior to July 1, 1902.

All public lands and buildings, not including harbor areas and navigable streams and bodies of water and the submerged lands underlying the same, owned by the United States in the island of Puerto Rico and not reserved by the President of the United States prior to July 1, 1903, pursuant to authority vested in him by law, are granted to the government of Puerto Rico, to be held or disposed of for the use and benefit of the people of said island. Said grant is upon the express condition that the government of Puerto Rico, by proper authority, release to the United States any interest or claim it may have in or upon the lands or buildings reserved by the President as mentioned herein. Nothing herein contained shall be so construed as to affect any legal or equitable rights acquired by the government of Puerto Rico or by any other party, under any contract, lease, or license made by the United States authorities prior to the 1st day of May 1900, July 1, 1902, c. 1383, § 1, 32 Stat. 731; May 17, 1932, c. 190, 47 Stat. 158.

48 U.S.C.A. § 747. Public property transferred

All property which may have been acquired in Puerto Rico by the United States under the cession of Spain in the treaty of peace entered into on the 10th day of December, 1898, in any public bridges, road houses, water powers, highways, unnavigable streams and the beds thereof, subterranean waters, mines or minerals under the surface of private lands, all property which at the time of the cession belonged, under the laws of Spain then in force, to the various harbor works boards of Puerto Rico, all the harbor shores, docks, slips, reclaimed lands, and all public lands and buildings not reserved by the United States for public purposes prior to March 2, 1917, is placed under the control of the government of Puerto Rico, to

be administered for the benefit of the people of Puerto Rico; and the Legislature of Puerto Rico shall have authority, subject to the limitations imposed upon all its acts, to legislate with respect to all such matters as it may deem advisable. Mar. 2, 1917, c. 145, § 7, 39 Stat. 954; May 17, 1932, c. 190, 47 Stat. 158.

48 U.S.C.A. § 749. Harbors and navigable waters transferred

The harbor areas and navigable streams and bodies of water and submerged lands underlying the same in and around the island of Puerto Rico and the adjacent islands and waters, owned by the United States on March 2, 1917, and not reserved by the United States for public purposes, are placed under the control of the government of Puerto Rico, to be administered in the same manner and subject to the same limitations as the property enumerated in sections 747 and 748 of this title. All laws of the United States for the protection and improvement of the navigable waters of the United States and the preservation of the interests of navigation and commerce, except so far as the same may be locally inapplicable, shall apply to said island and waters and to its adjacent islands and waters. Nothing in this chapter contained shall be construed so as to affect or impair in any manner the terms or conditions of any authorizations, permits, or other powers lawfully granted or exercised in or in respect of said waters and submerged lands in and surrounding said island and its adjacent islands by the Secretary of the Army or other authorized officer or agent of the United States prior to March 2, 1917. Mar. 2, 1917. c. 145, § 8, 39 Stat. 954; May 17, 1932, c. 190, 47 Stat. 158; July 25, 1947, c. 343, Title II, § 205(a), 61 Stat. 501.

12 L.P.R.A. § 43. Ownership of fish

All species of fish, mollusks, crustaceans, aquatic mammals, aquatic plants and all other species comprising the marine,

lacustrine and fluvial fauna and flora, are hereby declared to be the property of the Commonwealth of Puerto Rico and of common ownership and public use. They may be freely fished, caught, utilized, or traded, subject to the limtations of sections 41-63 of this title and of the regulations for their enforcement. May 13, 1936, No. 83, p. 438, § 3 July 1, 1953, No. 118, p. 458, § II, eff. July 1, 1953.

12 L.P.R.A. § 44. Jurisdictional waters

For the purpose of sections 41—63 of this title, the limit of the jurisdictional waters of the Commonwealth of Puerto Rico shall be three (3) miles from the shoreline of Puerto Rico and the islands politically belonging thereto.—May 13, 1936, No. 83, p. 438, § 4; July 1, 1953, No. 118, p. 453, § III, eff. July 1, 1953.

31 L.P.R.A. § 1023. Common things defined

Common things are those the ownership of which belongs to no one in particular and which all men may freely use in conformity with their innate nature, such as air, rain water, the sea and its shores.—Civil Code, 1930, § 254.

CONSTITUTION OF THE COMMONWEALTH OF PUERTO RICO

Art. VI §19. [Natural resources; historic or artistic sites; penal institutions; delinquents]

It shall be the public policy of the Commonwealth to conserve, develop and use its natural resources in the most effective manner possible for the general welfare of the community; to conserve and maintain buildings and places declared by the Legislative Assembly to be of historic or artistic value; to regulate its penal institutions in a manner that effectively achieves their purposes and to provide, within the limits of available resources, for adequate treatment of delinquents in order to make possible their moral and social rehabilitation.

APPENDIX E

Clean Water Act, 33 U.S.C. 1321(f) (5)

"(5) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government."

OCS Lands Act, 43 U.S.C. 1813(b)(3):

"...(3) under paragraph (2)(C), by the President, as trustees for natural resources over which the Federal Government has sovereign rights or exercises exclusive management authority, or by any State for natural resources within the boundary of the State belonging to, managed by, controlled by, or appertaining to the State, and sums recovered under paragraph (2)(C) shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or the State, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources;..."

Florida (F.S.A. Sec. 376.11(5)(c) (1974):

"376.11 Florida Coastal protection trust fund

(1) The purpose of this section is to provide a mechanism to have financial resources immediately available for cleanup and rehabilitation after a pollutant has been discharged, to prevent further damage by the pollutant, and to pay for damages. It is the legislative intent that this section be liberally construed to effect the purposes set forth, such interpretation being especially imperative in light of the danger to the environment and resources..."

"(5) Moneys in the Florida coastal protection fund shall be disbursed for the following purposes and no others:

(a) Administrative expenses, personnel expenses, and equipment costs of the department related to the enforcement of this chapter subject to § 376.18.

(b) All immediate costs involved in the abatement of pollution related to the discharge of pollutants covered by this chapter and the abatement of other potential pollution hazards as authorized herein.

(c) All costs and expenses of the cleanup and rehabilitation of water fowl, wildlife, and all other natural resources damaged by the discharge of pollutants, whether performed or authorized by the department or any other state or local agency.

(d) All provable costs and damages which are the proximate results of the discharge of pollutants covered by this chapter.

(6) The department shall recover to the use of the fund from the person or persons causing the discharge or from the federal government, jointly and severally, all sums owed or expended therefrom, pursuant to section 376.12(4), except that recoveries resulting from damage due to a discharge of a pollutant or other similar disaster shall be approtioned between the Florida coastal protection trust fund and the general revenue fund so as to repay the full costs to the general revenue fund of any sums disbursed therefrom as a result of such disaster. Requests for reimbursement to the fund for the above costs, if not paid within thirty days of demand, shall be turned over to the department of legal affairs for collection.
Amended by Laws 1974, c. 74-336, § 11, eff. July 1, 1974."

Maryland (A.C.Md. Natural Resources Sec. 8-1411(f) (1974):

"*(f) Maryland Oil Disaster Containment, Clean-up and Contingency Fund—Established; purpose; reimbursement by polluters; credits; debits.*—There is a Maryland Oil Disaster

Containment, Clean-up and Contingency Fund for the Department to use to develop equipment, personnel, and plans; for contingency actions to respond to, contain, clean-up, and remove from the land and waters of the State discharges of oil, petroleum products, and their by-products into, upon, or adjacent to the waters of the State; and restore natural resources damaged by discharges. The cost of containment, clean-up, removal, and restoration shall be reimbursed to the State by the person responsible for the discharge. The reimbursement shall be credited to the Fund. The Fund shall be limited to the sum of $1,000,000. To this sum shall be credited every license fee, fine, if imposed by the circuit court for any county or the Criminal Court of Baltimore, as the case may be, and any other charge related to this subtitle. To this Fund shall be charged every expense the Department has which relates to this section.
(1975, ch. 851; 1976, ch. 436; 1977, ch. 784, § 5.)"

Massachusetts (M.G.L.A. c.21 Sec. 27(14) (1973):

"**§ 27. Powers and duties of division**

It shall be the duty and responsibility of the division to enhance the quality and value of water resources and to establish a program for prevention, control, and abatement of water pollution. Said division shall:..."

"(14) Undertake immediately whenever there is spillage, seepage or other discharge of oil or hazardous material into or proximate to any of the waters of the commonwealth or into any offshore waters which may result in damage to the waters, shores or natural resources utilized or enjoyed by citizens of the commonwealth to cause said spillage, seepage or discharge to be contained and removed by whatever method it considers best. Chemicals shall not be used in the cleanup operation of oil or hazardous material spills unless their use has been authorized by the division, and if a public water supply or

shellfish beds may be affected, by the department of public health. In this clause, the word "oil" shall mean insoluble or partially soluble oils of any kind or origin or in any form including, but not limited to, crude or fuel oils, lube oil or sludge, asphalt, insoluble or partially insoluble derivatives of mineral, animal or vegetable oils.

The division shall determine the person responsible for causing such spillage, seepage or discharge and the names of all persons who owned or controlled the oil or hazardous material or who owned or controlled or leased the vessel, tank, pipe, hose or other container in which the oil or hazardous material was located when the spillage, seepage or discharge occurred. Said persons shall be jointly and severally liable to the commonwealth for all costs and expenses incurred by the division in making such investigation, and in containing and removing the oil or hazardous material, and shall be jointly and severally liable to the commmonwealth for all damages done to natural and recreational resources, including all costs of restoring damaged areas to their original condition, and to any other person for any damages to his real and personal property. The person responsible for causing such spillage, seepage or discharge shall be punished by a fine of not more than ten thousand dollars for each day such spillage, seepage or discharge continues, or by imprisonment for not more than two years or both.

Upon request of the director, the attorney general shall bring an action to recover all costs and expenses incurred for such investigation, containment, removal, and restoration.

Such costs and expenses shall be recovered in an action of tort, and shall be credited to the account from which said sums of money had been advanced and may, subject to appropriation, be expended by the division for the purposes set forth in this clause. In any such action the commonwealth may also seek recovery for all loss and damage to the natural and recreational resources of the commonwealth.

Any owner or operator of a vessel, vehicle, railroad car or facility used for the production processing, transportation, transfer or storage of oil or hazardous material shall, as soon as he has knowledge of any such spillage, seepage or discharge of oil or hazardous material into or proximate to waters of the commonwealth, promptly notify the director of the division or his representative of such discharge. Any person who fails so to notify the director or his representative of such discharge shall be punished by a fine of not more than five thousand dollars.

Any person who removes oil as defined in this clause, or hazardous material, as defined in section twenty-six A, from the waters of the commonwealth or adjoining shorelines shall be entitled to reimbursement from any other person for the reasonable costs expended for such removal, if such oil or hazardous material resulted from the negligence of two or more persons, each shall be liable to the others for his pro rata share of the cost or removal.

Any person who gratuitously renders assistance at the request of a duly authorized officer in removing oil or hazardous material from the waters of the commonwealth or adjoining shorelines shall not be held liable, notwithstanding any other provision of law, for civil damages as a result of any act of omission by him in removing such oil or hazardous material, except acts or omissions amounting to gross negligence or willful or wanton misconduct.

Amended by St.1973, c. 546, § 3; St. 1979; c. 705, § 2."

Mississippi (M.A.C. Sec. 49-27-55 (1979 Supp.)):

"§ 49-27-55. Civil liability of violators — restoration — punitive damages — mandatory injunction — jurisdiction of circuit or county court — remedies preserved.

(a) Any person who violates the provisions of this chapter shall be liable to the State of Mississippi for the restoration of all affected coastal wetlands to their condition prior to such

violation, insofar as such restoration is possible, and for any and all damages to the wetlands. The appropriate chancery court by writ of mandatory injunction shall allow a reasonable time for completion of the restoration and may, in its discretion, order as punitive damages a sum not to exceed fine hundred dollars ($500.00) per day for each day such violation has existed. The said chancery court may further order as punitive damages a sum not to exceed five hundred dollars ($500.00) per day for each day that the violation exists beyond the date set by said court in its unjunction for the restoration of said wetland. If injunctive relief is not sought, the appropriate circuit or county court shall have jurisdiction over any action for damages and/or punitive damages as set forth in this paragraph.

(b) Nothing in this chapter shall preclude other statutory or common law remedies by public or private parties against violators or nonviolators of this chapter.

SOURCES: Laws, 1973, ch. 385, § 8(d)(e), eff from and after July 1, 1973."

New Jersey (N.J.S.A. 58:10-23.11g(a)(2) 1979 Supp.)):

58:10-23.11g Liabilities for cleanup and removal costs and direct and indirect damages

a. The fund shall be strictly liable, without regard to fault, for all cleanup and removal costs and for all direct and indirect damages no matter by whom sustained, including but not limited to:

(1) The cost of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge, any income lost from the time such property is damaged to the time such property is restored, repaired or replaced, and any reduction in value of such property caused by such discharge by comparison with its value prior thereto;

(2) The cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge;

(3) Loss of income or impairment of earning capacity due to damage to real or personal property, including natural resources destroyed or damaged by a discharge; provided that such loss or impairment exceeds 10% or the amount which claimant derives, based upon income or business records, exclusive of other sources of income, from activities related to the particular real or personal property or natural resources damaged or destroyed by such discharge during the week, month or year for which the claim is filed;

New York (N.Y. Nar.L. 181(2)(b) (1979 Supp.)):

§ 181. Liability

1. Any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, as defined in this section.

2. The fund shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, including, but not limited to:

(a) The cost of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge, any income lost from the time such property is damaged to the time such property is restored, repaired, or replaced, any reduction in value of such property caused by such discharge by comparison with its value prior thereto;

(b) The cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge;

(c) Loss of income or impairment of earning capacity due to damage to real or personal property, including natural resources destroyed or damaged by a discharge; provided that such loss or impairment exceeds ten percent of the amount which claimant derives, based upon income or business records, exclusive of other sources of income, from activities

related to the particular real or personal property or natural resources damaged or destroyed by such discharge during the week, month or year for which the claim if filed;

(d) Loss of tax revenue by the state or local governments for a period of one year due to damage to real or personal property proximately resulting from a discharge;

(e) Interest on loans obtained or other obligations incurred by a claimant for the purpose of ameliorating the adverse effects of a discharge pending the payment of a claim in full as provided by this article.

North Carolina (N.C.G.S. Sec. 143-215.90 (1979 Supp.)):

§143-215.90. Liability for damage to public resources.

(a) Any person who discharges oil or other hazardous substances in violation of this Article or violates any order, rule or regulation of the Environmental Management Commission adopted pursuant to this Article, or fails to perform any duty imposed by this Article, or violates an order or other determination of the Environmental Management Commission made pursuant to the provisions of this Article, including the provisions of a discharge permit issued pursuant to G.S. 143-215.1, and in the course thereof causes the death of, or injury to fish, animals, vegetation or other resources of the State or otherwise causes a reduction in the quality of the Waters of the State below the Standards set by the Environmental Management Commission, shall be liable to pay the State damages. Such damages shall be an amount equal to the cost of all reasonable and necessary investigations made or caused to be made by the Environmental Management Commission in connection with such violation and the sum of money necessary to restock such waters, replenish such resources, or otherwise restore the rivers, streams, bays, tidal flats, beaches, estuaries or coastal waters and public lands adjoining the seacoast to their condition prior to the injury as such condition is determined by the Environmental Management Commis-

sion in conference with the Wildlife Resources Commission, and any other State agencies having an interest affected by such violation (or by the designees of any such boards, commissions, and agencies).

(b) Upon receipt of the estimate of damages caused, the Department shall give written notice by registered or certified mail to the person responsible for the death, killing, or injury to fish, animals, vegetation, or other resources of the State, or any reduction in quality of the waters of the State, describing the damages and their causes with reasonable specificity, and shall request payment from such person. Damages shall become due and payable upon receipt of such notice. Upon written application to the Department within 30 days of receipt of notice, the person assessed damages may request an administrative hearing pursuant to G.S. 143-215.4. On such hearing, the estimate of the replacement cost of fish or animals or vegetation destroyed, and the estimate of costs of replacing or restoring other resources of the State, and the estimate of the cost of restoring the quality of waters of the State shall be *prima facie* evidence of the actual replacement cost of fish, animals, vegetation or other resources of the State, and of the actual cost of restoring the quality of the waters of the State; provided, that such evidence is rebuttable. In arriving at such estimate, any reasonably accurate method may be used and it shall not be necessary for any agent of the Department of Wildlife Resources Commission to collect, handle, or weigh numerous specimens of dead or injured fish, animals, vegetation or other resources of the State, or to calculate the costs of restoring the quality of the waters using any technology other than that which is existing and practicable, as found to be such by the Secretary. Provided, that the Department may effect such mitigation of the amount of damages as the commission may deem proper and reasonable. Appeal from final determination of the commission or its agents pursuant to such a hearing shall be pursuant to G.S. 143-215.5. If the damages

are not paid to the Department within 30 days of receipt of notice, or if the amount of damages provided in an order issued subsequent to an application to the Department is not paid within 30 days of the issuance thereof, the Attorney General, upon request of the Department, shall bring an action to recover such damages in the name of the State, in the Superior Court of Wake County, or in his discretion, in the superior court of any other county in which the damages occurred. Upon such action being brought, the scope of the court's review shall be as provided in G.S. 150A-51. Any money recovered by the Attorney General or by payment of damages by the person charged therewith by the Department shall be transferred by the Environmental Management Commission to appropriate funds administered by the State agencies affected by the violation for use in such activities as food fish or shellfish management programs, wildlife and waterfowl management programs, water quality improvement programs and such other uses as may best mitigate the damage incurred as a result of the violation. No action shall be authorized under the provisions of this section against any person operating in compliance with the conditions of a waste discharge permit issued pursuant to G.S. 143-215.1 and the provisions of this Part.

(c) For the purpose of carrying out its duties under this Article, the Environmental Management Commission shall have the power to direct the investigation of any death, killing, or injury to fish, animals, vegetation or other resources of the State, or any reduction in quality of the waters of the State, which in the opinion of the Environmental Management Commission is of sufficient magnitude to justify investigation. (1973, c. 534, s. 1; c. 1262, s. 23; 1979, c. 535, s. 24.)

Oklahoma (82 O.S.A. Sec. 937(b) (1971)):

§ 937. Penalties-Injunctions

(a) Any person who knowingly or willfully violates any properly promulgated order of the Pollution Control Coor-

dinating Board shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than Five Hundred Dollars ($500.00) per day for each of the first ten (10) days of continuous violation and One Thousand Dollars ($1,000.00) for each day thereafter, or by imprisonment for a term of not more than ninety (90) days or by both such fine and imprisonment. Each and every day the violation occurs shall constitute a separate violation.

(b) Any person, firm or corporation who violates any of the provisions of, or fails to perform any duty imposed by this act or regulation issued hereunder, or who violates any order or determination of the Board promulgated pursuant to this act, which violation causes the death of fish or other wildlife shall, in addition to the penalties provided in subsection (a), be liable to pay to the state an amount equal to the sum of money reasonably necessary to restock such waters which shall include replacement cost of fish killed based on the most recent fish values as officially published by the American Fishery Society, Southern Division, and all other costs required for such restocking including but not limited to shipment and handling, or replenish such wildlife and all cost incurred in investigating, locating or establishing the responsible person, firm or corporation as determined by the Oklahoma Wildlife Conservation Commission and approved by the Board. Such amount may be recovered by the Board on behalf of the state in a civil action brought in the district court and shall be divided among the agencies in accordance with the expenses incurred, as determined by the Board.

(c) It shall be the duty of the Attorney General on the request of the Board to bring an action for an injunction against any person, firm or corporation violating the provisions of this act, or violating any order or determination of the Board. In any action for an injunction brought pursuant to this section, any finding of the Board after hearing on due notice shall be prima facie evidence of the fact or facts found therein.

(d) Upon showing by the Attorney General in behalf of the Board that such person is violating or is about to violate the provisions of this act or is violating or is about to violate any order or determination of the Board, an injunction shall be granted without the necessity of showing a lack of adequate remedy at law.
Amended by Laws 1971, c. 338, § 10, operative July 1, 1971; Laws 1976, c. 21, § 1.

Oregon (O.R.S. Sec. 468.745 (977)):

468.745 Liability for damage to fish or wildlife or habitat; agency to which damages payable.

(1) Where the injury, death, contamination or destruction of fish or other wildlife or injury or destruction of fish or wildlife habitat results from pollution or from any violation of the conditions set forth in any permit or of the orders or rules of the commission, the person responsible for the injury, death, contamination or destruction shall be strictly liable to the state for the value of the fish or wildlife so injured or destroyed and for all costs of restoring fish and wildlife production in the affected areas, including habitat restoration.

(2) In addition to the penalties provided for by law, the state may seek recovery of such damages in any court of competent jurisdiction in this state if the person responsible under subsection (1) of this section fails or refuses to pay for the value of the fish or wildlife so destroyed and for all costs of restoring fish and wildlife production in the affected areas, including habitat restoration, within a period of 60 days from the date of mailing by registered or certified mail of written demand therefor.

(3) Any action or suit for the recovery of damages described in subsection (1) of this section shall be brought in the name of the State of Oregon upon relation of the Department of Environmental Quality or State Department of Fish and Wildlife or the Attorney General. Amounts recovered under this sec-

tion shall be paid to the state agency having jurisdiction over the fish or wildlife or fish or wildlife production for which damages were recovered. [Formerly 449,109, 1979 c. 534 § 1]

Virginia (Va. Code Sec. 62.1-44.15(11) (a)):

§62.1-44.15. Powers and duties.

It shall be the duty of the Board and it shall have the authority:...

(11) To investigate any large-scale killing of fish.

(a) Whenever the Board shall determine that any owner, whether or not he shall have been issued a certificate for discharge of waste, has discharged sewage, industrial waste, or other waste into State waters in such quantity, concentration or manner that fish are killed as a result thereof it may effect such settlement with the owner as will cover the costs incurred by the Board and by the Commission of Game and Inland Fisheries in investigating such killing of fish, plus the replacement value of the fish destroyed, or as it deems proper, and if no such settlement is reached within a reasonable time the Board shall authorize its executive secretary to bring a civil action in the name of the Board to recover from the owner such costs and value, plus any court or other legal costs incurred in connection with such action.

Washington (R.C.W. Sec. 90.48.142 (1977)):

90.48.142 Violations-Liability in damages for injury or death of fish, animals, vegetation-Action to recover

Any person who violates any of the provisions of this chapter, or fails to perform any duty imposed by this chapter, or violates an order or other determination of the commission or the director made pursuant to the provisions of this chapter, including the conditions of a waste discharge permit issued pursuant to RCW 90.48.160, and in the course thereof causes the death of, or injury to, fish, animals, vegetation or other resources of the state, or otherwise causes a reduction, in the

quality of the state's waters below the standards set by the commission, thereby damaging the same, shall be liable to pay the state damages in an amount equal to the sum of money necessary to restock such waters, replenish such resources, and otherwise restore the stream, lake or other water source to its condition prior to the injury, as such condition is determined by the commission. Such damages shall be recoverable in action brought by the attorney general on behalf of the people of the state of Washington in the superior court of the county in which such damages occurred; *Provided*, that if damages occurred in more than one county the attorney general may bring action in any of the counties where the damages occurred. Any money so recovered by the attorney general shall be transferred to either the state game fund or the department of fisheries to use for food fish or shellfish management purposes and propagation, or to any other agency of the state having jurisdiction over the resource damaged and for which said moneys were recovered, as appropriate: *Provided*, that the agency receiving such money, shall utilize not less than one-half of said money on activities or projects within the county where the action was brought by the attorney general. No action shall be authorized under this section against any person operating in compliance with the conditions of a waste discharge permit issued pursuant to RCW 90.48.160 [Added by Laws 1st Ex Sess 1967 ch. 139 § 13; Amended by Laws 1st Ex Sess 1970 ch. 88 § 12, effective February 23, 1970.]

No. 80-758

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE S.S. ZOE COLOCOTRONI, MARBONANZA COMPAÑIA NAVIERA, S.A., COLOCOTRONI LTD., COLOCOTRONI BROTHERS, S.A., THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG) and THE WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LONDON) LIMITED,

Petitioners,

-against-

THE COMMONWEALTH OF PUERTO RICO and THE ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

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January 14, 1981

TABLE OF CONTENTS

	PAGE
Revision of the Questions Presented	1
ARGUMENT	3
I. Plaintiffs' References to Prejudicial Matter Should Be Disregarded	3
II. Plaintiffs' Argument That the Hartzell Law Firm Performed Services for West of England Other Than in a Legal Capacity Was Properly Rejected by the District Court and the Court of Appeals	4
III. It Was Not Within the Power of the Court Below To Create a Damage Remedy at Variance with the Common Law and Which the Legislature Had Failed To Enact	5
A. The Diminution Rule Governs Actions at Admiralty	5
B. The Theory of Damages Propounded by the Court of Appeals is Without Support in the Law and Would Permit Plaintiffs to Reap an Unconscionable Windfall	7
C. Modification of the Normal Rule of Damages Is Within the Province of the Legislatures, Not the Courts	10
CONCLUSION	11

TABLE OF AUTHORITIES

Cases PAGE

Banks v. *Chicago Grain Trimmers Association*, 390 U.S. 459 (1968) 10

Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) 2

Demetrius Maritime Co. v. *S/T "CONNECTICUT"*, 463 F. Supp. 1108 (S.D.N.Y. 1979) 5

Examining Board of Engineers, Architects and Surveyors v. *Flores de Otero*, 426 U.S. 572 (1976) 2

Gila River Pima-Maricopa Indian Community v. *United States*, 467 F.2d 1351 (Ct. Cl. 1972) 10

The Nyland, 164 F. Supp. 741 (D. Md. 1958) 6, 7

O'Brien Brothers, Inc. v. *The Helen B. Moran*, 160 F.2d 502 (2d Cir. 1947) 6

Pinto v. *M/S "Fernwood"*, 507 F.2d 1327 (1st Cir. 1974) 5

Stagg, Mather & Hough v. *Descartes*, 244 F.2d 578 (1st Cir. 1957) 2

Zeller Marine Corp. v. *Nessa Corp.*, 166 F.2d 32 (2d Cir. 1948) 5

Statutes

Fed. R. Civ. P. Rule 37(b)(2)(c) 3

Puerto Rico Forest Act

§ 3(B), 12 L.P.R.A. § 193(B) (1976) 9

§ 9, 12 L.P.R.A. § 199 (1976) 10n

§ 14, 12 L.P.R.A. § 204 (1976) 10n

Public Policy Environmental Act, Section 11(29), 12 L.P.R.A. § 1131 (29) (1978) 7, 10

PAGE

Puerto Rico Swampy or Barren Land Reclamation Act

28 L.P.R.A. §§ 71-86 (1966) 8, 9
28 L.P.R.A. § 79 9
28 L.P.R.A. § 80 9
28 L.P.R.A. § 82 9
28 L.P.R.A. § 84 8
28 L.P.R.A. § 86 9

Other Authorities

F. Roscoe, The Measure of Damages in Actions of Maritime Collisions (3d ed. 1929) 6

Report of the Committee on Conservation of the American Ornithologists' Union, The Outlook for Wildlife Conservation in Puerto Rico (1975-1976).... 9

Restatement (Second) of Torts § 929 (1979) 6

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

Revision of the Questions Presented

Since it is clear that the federal constitutional guarantees of due process of law and equal protection of the laws are extended to Puerto Rico by the Due Process Clause of the

Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment,[1] questions one and three have been revised accordingly, as set forth below:

> 1. Whether, consistently with the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution, a Puerto Rico federal court may exercise in personam jurisdiction over a foreign marine protection and indemnity insurance company in an admiralty action, if the insurer's only contacts with the forum were its retainer of a Puerto Rico law firm and the fact that ships covered under its policies of indemnity insurance occasionally have been present in the territorial waters of Puerto Rico?
>
> * * *
>
> 3. Whether, consistently with the Due Process Clause of the Fifth Amendment to the Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, a foreign insurance company may be held to a more stringent standard for a determination of whether it is amenable to the personal jurisdiction of the Puerto Rico federal court in an admiralty action, than other non-resident corporations?

These technical revisions do not change the questions substantively. *See Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero,* 426 U.S. 572, 600-601 (1976); *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 668 n.5 (1974); *Stagg, Mather & Hough* v. *Descartes,* 244 F.2d 578, 583 (1st Cir. 1957).

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1. The courts have deemed it unnecessary to determine whether the federal guarantees of due process and equal protection are extended to Puerto Rico by the Fifth Amendment or the Fourteenth Amendment. *E.g.,* Examining Board of Engineers, Architects and Surveyors *v.* Flores de Otero, 426 U.S. 572, 600-601 (1976).

ARGUMENT

I.

PLAINTIFFS' REFERENCES TO PREJUDICIAL MATTER SHOULD BE DISREGARDED.

Since defendants' answers were stricken and judgment entered against them on the question of liability as a sanction under Rule 37(b)(2)(c), Fed.R.Civ.P., defendants were not permitted to offer evidence on the cause of the grounding of the ZOE COLOCOTRONI or her condition at the time of the accident. Nevertheless, nine pages of Judge Torruella's decision were devoted to the circumstances of the accident, which was not litigated. (58a-67a). In support of this irrelevant narrative, the trial judge had relied on the self-serving depositons of the ZOE COLOCOTRONI's master and other crew members, none of which were in evidence. The court of appeals agreed with defendants that the district court's findings on liability were redundant, but ruled that the trial court's attitude had not been "poisoned" against defendants by the crew depositions on the other questions at issue. (23a-24a).

Notwithtanding, plaintiffs have again recited the crew members' unsubstantiated version of the grounding in both their brief in opposition to the petition for certiorari (p. 2) and in their cross-petition for certiorari, No. 80-979 (pp. 3-4, 11). These allegations are without basis in the record and irrelevant and should be disregarded by the Court.

II.

PLAINTIFFS' ARGUMENT THAT THE HARTZELL LAW FIRM PERFORMED SERVICES FOR WEST OF ENGLAND OTHER THAN IN A LEGAL CAPACITY WAS PROPERLY REJECTED BY THE DISTRICT COURT AND THE COURT OF APPEALS.

The main thrust of plaintiffs' argument in opposition to the writ of certiorari on the question of long-arm jurisdiction over West of England is that the Hartzell law firm served as a general agent of West of England, not merely as attorney for its client. These same contentions were raised below, but were rejected by the district court and the court of appeals. (25a, 114a-115a). Personal jurisdiction over West of England was predicated on alleged relations with the forum much more tenuous than the claimed employment of an agent.

The files of the Hartzell law firm relating to West of England and its insureds show that Hartzell rendered services only in cases of actual or potential legal claims. (SA272-SA623; see Reply Brief for the Appellants, filed February 14, 1980 with the Court of Appeals for the First Circuit, Nos. 78-1543 & 79-1468, at 25-27). Moreover, in most of these cases, it is clear from the documents in the record that the Hartzell firm served as attorneys for insured shipowners rather than for West of England.[2] *Id.*

2. Although the court of appeals declined to hold that the services performed by Hartzell for West of England were outside the scope of the attorney-client relationship, it nevertheless relied upon that relationship to support its finding that West of England could have foreseen that it would be sued in Puerto Rico. (25a-30a). Such use of the attorney-client relationship as a jurisdictional "contact" is unprecedented and should be reviewed by this Court.

III.

IT WAS NOT WITHIN THE POWER OF THE COURT BELOW TO CREATE A DAMAGE REMEDY AT VARIANCE WITH THE COMMON LAW AND WHICH THE LEGISLATURE HAD FAILED TO ENACT.

A. The Diminution Rule Governs Actions at Admiralty.

Plaintiffs display a penchant for the phrase *restitutio in integrum,* "one of those scraps of Latin which serve only to bemuse the user and usually the hearer." *Zeller Marine Corp.* v. *Nessa Corp.,* 166 F.2d 32, 35 (2d Cir. 1948) (Learned Hand, J., dissenting). They contend that pursuant to the principle of *restitutio in integrum,* the owner of a ship damaged in a collision has an unconditional right to restoration of his vessel to its condition immediately before the collision. (Respondents' Brief at 28). Since the instant case was brought within the admiralty jurisdiction of the district court, plaintiffs argue that the rule of *restitutio in integrum* is controlling, and that they therefore are entitled to have their property restored to its condition prior to the oil spill, regardless of the cost.

Actually, the measure of damages traditionally applicable in collision cases is the diminution in the ship's value resulting from the accident. However, "the cost of necessary repairs and demurrage, profits lost while repairs are being made, have long been accepted as its equivalent." *Demetrius Maritime Co.* v. *S/T "CONNECTICUT",* 463 F. Supp. 1108, 1109 (S.D.N.Y. 1979) (Lumbard, J.). *Accord, Pinto* v. *M/S "Fernwood",* 507 F.2d 1327, 1331 (1st. Cir. 1974).

Moreover, the law is clear that collision damages may not exceed the fair market value of the damaged ship:

> "When a vessel is so much damaged by a collision that a prudent uninsured owner would not repair

> her, such vessel must then be considered as a constructive total loss, and her owner is entitled to claim from the wrongdoer the value of the ship as if she had been actually and totally lost. . . . This rule is based on the principle of *restitutio in integrum* . . ., because the loss of the value of a ship is the maximum loss which can result from a collision. It is also supported by the principle that the injured party must minimize his loss so far as is reasonably possible. To take a simple example, if a ship which is only worth at the time of collision £5,000 is so much injured that the cost of repairs will be £6,000, it would be obviously unjust to demand from the wrongdoer as damages a sum greater than that which would give the owner of the injured vessel the actual value of his ship at the moment of collision. Hence, adopting a convenient phrase of insurance law, the injured vessel has, under such circumstances, become a constructive total loss, and her owner is to be indemnified, not by the payment to him of the cost of repair, but of the value of his vessel." F. ROSCOE, THE MEASURE OF DAMAGES IN ACTIONS OF MARITIME COLLISIONS 51 (3d ed. 1929) (footnote omitted.)

Thus, in *O'Brien Brothers, Inc.* v. *The Helen B. Moran,* 160 F.2d 502, 506 (2d Cir. 1947), the court of appeals held that "the cost of repairs and demurrage can only be allowed if such cost of repairs did not exceed the value of the barge at the time of the collision."

It is obvious that in an appropriate case, a federal court sitting in admiralty should apply the same rule for measuring damages that has been well established at common law and included in the RESTATEMENT (SECOND) OF TORTS—the "diminution rule". One such case, where the cost of repairs was demonstrably greater than the diminution in value, was *The Nyland,* 164 F. Supp. 741 (D. Md.

1958), involving collision damage to an overaged Liberty Ship, the "E. KIRBY SMITH." The district court found that the fair market value of the SMITH before the collision was $351,500, and that repairs would have cost $269,121. 164 F. Supp. at 743. However, the government did not repair the ship, but sold her for scrap for $147,-777.77. *Id.* Accordingly, the court awarded damages of $203,722.23, the difference between the SMITH'S value before the collision and her value as scrap after the collision, since this sum was less than the cost of repairing the vessel. 164 F. Supp. at 745.

B. The Theory of Damages Propounded by the Court of Appeals is Without Support in the Law and Would Permit Plaintiffs to Reap an Unconscionable Windfall.

The court of appeals' decision leaves open the possibility that the Commonwealth may recover environmental damages in further proceedings before the district court. If this should occur, plaintiffs would be better off than they were before the oil spill by the amount of damages awarded, since they would be able to sell the impacted property for at least as much as it would have brought prior to the oil spill. Thus the rule for measuring environmental damages propounded by the court of appeals would permit a double recovery and clearly is contrary to the great body of common law of damages.

Neither plaintiffs nor the court below have cited any legislative history in support of the court's ruling that the statute permitting recovery of the "total value of the damages caused to the environment and/or natural resources"[3] repeals the common law of damage evaluation. Nor do the cases support this decision. Indeed, plaintiffs have conceded that this case is governed by the principles of admi-

3. 12 L.P.R.A. § 1131 (29) (1978).

ralty law, which, as noted previously, incorporate the well-established "diminution rule."

Plaintiffs have argued that their recovery should not be limited by the diminution rule to the pecuniary value of their loss on grounds that the mangrove lands which were polluted by oil are not marketable. (Respondents' Brief at 30). However, *the laws of Puerto Rico specifically provide for draining and selling the Commonwealth's mangrove swamp lands.* Puerto Rico Swampy or Barren Land Reclamation Act, 28 L.P.R.A. §§ 71-86 (1966).[4] Pursuant to Section 84 of this statute,

> "The Secretary of Public Works is hereby authorized to proceed to drain mangrove swamp lands belonging to natural persons or to bodies politic, for an adequate consideration in money or in mangrove swamp lands. *He is likewise authorized to drain the mangrove swamp lands belonging to the Commonwealth of Puerto Rico and to sell and lease thm after they have been drained,* subject to such limitations mentioned in section 80 of this title as may be applicable." 28 L.P.R.A. § 84 (emphasis added).

The following conditions of sale are applicable:

> "Provided, That the drained lands belonging to the Commonwealth of Puerto Rico shall be devoted to the creation of workmen's settlements or agricultural farms . . . ; Provided, further, That *the Secretary of Public Works is hereby empowered to sell mangrove swamp lands* to the municipalities and to charitable

4. The Act's statement of motives provides:
"The existence in Puerto Rico of approximately 16,000 *cuerdas* of waste lands, swamps, marshes or poorly drained lands which can be improved and changed into fertile highly productive lands is not . . . justified. Such lands are furthermore, sources of infection, or breeding places for the mosquito which transmits malaria, and must be eliminated. . . ." 28 L.P.R.A. at p. 209.

> or educational institutions to be devoted to the construction of buildings for said purposes, *for a nominal price* but always with the condition that said mangrove swamp lands be drained and the buildings constructed within the time indicated by the Secretary of Public Works." 28 L.P.R.A. § 80 (emphasis added). *See also* 28 L.P.R.A. §§ 79, 82, 86.

Thus, contrary to plaintiffs' contentions, the mangrove lands at Bahia Sucia may be sold by the Commonwealth.

Any natural areas belonging to the Commonwealth, even Commonwealth Forest reserves,[5] may be transferred from the control of the Puerto Rico Department of Natural Resources for development. Puerto Rico Forest Act, § 3(B), 12 L.P.R.A. § 193(B) (1976). For example, the biologically important Aguirre Forest was transferred from the Commonwealth Forest system and developed,[6] and "Puerto Rico's best locality for terns and gulls and one of the island's prime shorebird areas" was "practically eliminated" by the Commonwealth's recent conversion of the San Juan Bay mudflat into a port facility.[7]

When lands are removed from the Commonwealth Forest system for development, the system must be reimbursed "by monetary compensation on the basis of . . . *fair market value.*" Puerto Rico Forest Act, § 3(B), 12 L.P.R.A. § 193 (B) (1976) (emphasis added.) This well-founded standard

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5. The mangrove lands at Bahia Sucia have not been designated as a Commonwealth Forest.

6. See Report of the Committee on Conservation of the American Ornithologists' Union, The Outlook for Wildlife Conservation in Puerto Rico (1975-1976) at 3DD-4DD. This pessimistic report concludes: "Until there is proper management of what the Department of Natural Resources, not to mention the Government of Puerto Rico, already controls, there is little hope for the future of Puerto Rico's wildlife." *Id.*

7. *Id.*

of valuation would properly be applied if the Commonwealth were to transfer West Mangrove to a new owner. *Cf. Gila River Pima-Maricopa Indian Community* v. *United States,* 467 F.2d 1351, 1357 (Ct. Cl. 1972).

C. Modification of the Normal Rule of Damages Is Within the Province of the Legislatures, Not the Courts.

In light of plaintiffs' failure to marshall any support at all for the court of appeals' decision to remand the case for further proceedings on the question of damages, we respectfully submit that the court has improperly assumed the powers of a legislature and adopted a new rule of law which the legislature had failed to enact. The statute pursuant to which this suit was brought simply creates a right of action; it does not specify how damages should be computed. 12 L.P.R.A. § 1131(29). Since the legislature provided no mandate or guidance on the computation of damages, the courts are bound to apply the common law. *See Banks* v. *Chicago Grain Trimmers Association,* 390 U.S. 459, 465 (1968). If the common law was to be changed, it was up to the legislature to do so.[8]

8. Indeed, since the time of the ZOE COLOCOTRONI oil spill, statutory penalties for damaging "any tree or shrub . . . in property of the Commonwealth of Puerto Rico" have been enacted. Puerto Rico Forest Act, §§ 9, 14, 12 L.P.R.A. §§ 199, 204 (1976).

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the petition for a writ of certiorari, defendants respectfully submit that their petition should be granted.

Respectfully submitted,

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